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A TREATISE

ON THE LAW OF

SUITS BY ATTACHMENT

IN

THE UNITED STATES.

BY

CHARLES D. DRAKE, LL.D.

THIRD EDITION, REVISED AND ENLARGED;

WITH

AN APPENDIX,

CONTAINING THE LEADING STATUTORY PROVISIONS OF THE SEVERAL STATES AND TERRITORIES OF THE UNITED STATES, IN RELATION TO SUITS BY ATTACHMENT.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1866.

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Cambridge.

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TO

MY BROTHER-IN-LAW,

ALEXANDER H. McGUFFEY, ESQ.,

OF CINCINNATI,

AS AN EXPRESSION OF ADMIRATION, RESPECT,

AND AFFECTION,

THIS WORK IS DEDICATED.

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PREFACE

TO THE THIRD EDITION.

The call for a third edition of this work leaves no room for doubt that it has been found useful to the profession, and will hold its place in their libraries until superseded by some better treatise on the subject.

This has led me to increased effort to make the book more acceptable. It has been revised with critical care, and many imperfections of style and arrangement have been detected and removed, many passages rewritten, and a new chapter — the thirty-fourth — added.

The more than three hundred volumes of American Reports, issued since the publication of the second edition, have been carefully explored, and a large amount of valuable matter gleaned from them.

Owing to the printing of the book in smaller type than was previously used, the number of its pages is reduced; but the quantity of matter incorporated in the text and notes is much greater than in the last edition, and more than six hundred additional cases are cited.

I may be excused for mentioning, as evidence of the value of such a work under any of the attachment systems of this country, that this book has been cited as authority by the Supreme Court of the United States, and by the courts of many of the States, in their reported decisions; and I have reason to believe that in every part of the country it is resorted to by the profession, as applicable,

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generally, to any system of attachment law. It is gratifying thus to see the judgment approved, which first led to its preparation.

With respectful and cordial acknowledgment of the favor with which the work has been received, I submit this edition to the profession.

St. Louis, August, 1866.

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PREFACE

TO THE FIRST EDITION.

THE necessity for a work on the law of Suits by Attachment in the United States occurred to me early in my professional life; but I shared the then prevalent impression of the Bar, that the Attachment Acts of the several States were so dissimilar as to baffle any attempt at a systematic treatise on that subject, based on the jurisprudence of the whole country and adapted for general use. Some years since, however, in preparing for the argument of a question of garnishment, an examination of the Reports and legislation of a majority of the States satisfied me — and all subsequent researches have but confirmed the opinion — that the diversity in the statutes constituted in reality no impediment of any moment to the successful preparation of such a treatise. The purpose to prepare this volume was then formed, and has been prosecuted, at irregular intervals, in the midst of other and more pressing avocations, until the result is now submitted to the profession.

The value of the proceeding by Attachment is everywhere asserted in the reported opinions of our higher State courts, and is universally and practically illustrated in the history of the Colonial, Territorial, and State legislation of this country. Among the early statutes enacted, have always been those authorizing the preliminary attachment of the property of debtors; and the general tendency has been, and is, to enlarge the scope and increase the efficiency of this remedy. Upon these grounds alone the importance of this subject might, if necessary, be amply vindicated; but on

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that point no doubt has at any time disturbed the prosecution of my task. My conviction is, that on no branch of the law is a treatise more needed by the profession in this country than on this; and it is gratifying to know that such is the general opinion of my professional brethren, wherever the proposed preparation of this work has been known. It is now to be decided whether this attempt to supply an acknowledged need will be regarded with equal favor.

The materials here wrought together are almost wholly *American.* Great Britian, the fountain of, and exercising continually a marked influence over, our jurisprudence generally, contributes in this department comparatively nothing. In that country, the Bankrupt law, and the process against the body, leave little room or occasion for a general system of Attachment; while the limited proceeding under the custom of London gives rise to few cases which find their way into the courts of Westminster Hall. Here, however, where no general Bankrupt law exists, and imprisonment for debt is to a great extent abolished, it is widely different. The universal use of this remedy fills our Reports with cases presenting every variety of questions, and the lapse of time and the accumulation of adjudications seem to make no sensible diminution in the annual number of reported cases, nor any great difference in their novelty or their interest. Hence a work of this description reflects in a high degree a legal system and a branch of jurisprudence peculiarly our own; and I confess to somewhat of satisfaction at being instrumental in presenting to the Bar of the United States a volume which, without intentionally slighting what is to be found in the English Reports on the subject, may be justly claimed to be thoroughly American.

My effort has been to make it methodical, perspicuous, accurate, and sufficiently full. Had I at any time supposed it free from defects in these and other respects, the delusion would have been effectually dispelled by the perusal of it in print, as the sheets (not read by me in the proofs) have been forwarded to me. Many de-

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fects and blemishes will no doubt be perceived by others, as they have been by myself, when too late to correct them. In regard to them I deprecate neither enlightened criticism nor fair censure; but yet my trust is that they will not be regarded as materially impairing the value of the work, and that this essay toward discharging, in part, my debt to the profession of my choice, by lightening the labors of my compatriots in its ranks, may be found a useful aid, and may meet with an indulgent, if not a cordial reception.

It were improper to close these brief prefatory remarks without an acknowledgment of my obligations to the treatise of L. S. Cushing, Esq., on the Trustee Process of Massachusetts and Maine, for the general features of the plan of arrangement of that portion of these pages relating to Garnishment and Garnishees.

CHARLES D. DRAKE.

St. Louis, Missouri, July 1, 1854.

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NOTE.

All the references in the Table of Contents, Index to Cases cited, and General Index, are to the *Sections*.

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LAW OF SUITS BY ATTACHMENT.

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THE

LAW OF SUITS BY ATTACHMENT.

CHAPTER I.

ORIGIN, NATURE, AND OBJECTS OF THE REMEDY BY ATTACHMENT.

§ 1. THE preliminary attachment of a debtor's property, for the eventual satisfaction of the demand of a creditor, is unquestionably a proceeding of great antiquity. Whether the statement of Mr. Locke, in his Treatise on the Law of Foreign Attachment in the Lord Mayor's Court of London, ascribing its origin to the Roman law, be capable of exact verification, need not now detain us.[1] It is sufficient for the present purpose, that, so far as its use in the United States is concerned, we have no difficulty in finding its origin in the custom of Foreign Attachment of London, which is agreed by all authorities to have a very ancient existence. This, with other customs of that city, has, from time to time, been confirmed by Royal Charters and Acts of Parliament, and is declared "never to become obsolete by non-user or abuser." It is a singular incident of those customs, that "they may be and are certified and are recorded by word of mouth; and it is directed that the mayor and aldermen of the city, and their successors, do declare by the Recorder whether the things under dispute be a custom or not, before any of the King's justices, without inquest by jury, even though the citizens themselves be parties to the matter at issue; and being once recorded, they are afterwards judicially no-

[1] The following passage in Adams's Roman Antiquities, by Wilson, p. 194, is probably that to which Mr. Locke refers, as sustaining his position: "It was unlawful to force any person to court from his own house, because a man's house was esteemed his sanctuary (*tutissimum refugium et receptaculum*). But if any lurked at home to elude a prosecution (*si fraudationis causâ latitaret*, Cic. Quint. 19), he was summoned (*evocabatur*) three times, with an interval of ten days between each summons, by the voice of a herald, or by letters, or by the edict of the prætor; and if he still did not appear (*se non sisteret*), the prosecutor was put in possession of his effects."

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ticed."[1] We accordingly find the custom of Foreign Attachment certified by Starkey, Recorder of London, as early as 22 Edward IV. to be: "That if a plaint be affirmed in London, before, &c., against any person, and it be returned *nihil*, if the plaintiff will surmise that another person within the city is a debtor to the defendant in any sum, he shall have garnishment against him, to warn him to come in and answer whether he be indebted in the manner alleged by the other; and if he comes and does not deny the debt, it shall be attached in his hands, and after four defaults recorded on the part of the defendant, such person shall find new surety to the plaintiff for the said debt; and judgment shall be that the plaintiff shall have judgment against him, and that he shall be quit against the other, after execution sued out by the plaintiff."

§ 2. The custom thus set forth, was, it is believed, first treated of in an orderly manner by Mr. Bohun, in a work entitled "Privilegia Londini: or, the Rights, Liberties, Privileges, Laws, and Customs of the City of London"; of the third edition of which a copy, printed in 1723, is before me; in which the author remarks: "It may be here observed, that altho' the Charters of the City of London (as they are here recited by 15 Car. II.) do begin with those of William I., yet it must not be understood as if any of the city rights, liberties, or privileges were originally owing to the grants of that prince. For 't is evident, the said City and Citizens had and enjoyed most of the liberties and privileges mentioned in the following charters (besides divers others not therein enumerated) by immemorial usage and custom long before the arrival of William I."

§ 3. This custom, notwithstanding its local and limited character, was doubtless known to our ancestors, when they sought a new home on the Western continent, and its essential principle, brought hither by them, has, in varied forms, become incorporated into the legal systems of all our States; giving rise to a large body of written and unwritten law, and presenting a subject of much interest to legislatures and their constituents, as well as to the legal profession and their clients. Our circumstances as a nation have tended peculiarly to give importance to a remedy of

[1] Locke on Foreign Attachment, XVI.

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this character. The division of our extended domain into many different States, each sovereign within its territory, inhabited by a people enjoying unrestrained privilege of transit from place to place in each State, and from State to State; taken in connection with the universal and unexampled expansion of credit, the absence of a general Bankrupt Law, and the prevalent abolishment of imprisonment for debt; would naturally, and of necessity, lead to the establishment, and, as experience has demonstrated, the enlargement and extension, of remedies acting upon the property of debtors. The results of this tendency, in the statute law of the several States, may be discovered by reference to their leading statutory provisions, as found in the Appendix; while those connected with the judicial administration of the law appear in the succeeding chapters of this work.

§ 4. In its nature this remedy is certainly anomalous. As it exists under the custom of London, it has hardly any feature of a common law proceeding. At common law the first step in an action, without which no other can be taken, is to obtain service of process on the defendant; under the custom, this is not only not done, but it was declared by Lord Mansfield, that the very essence of the custom is that the defendant shall not have notice. At common law a debtor's property can be reached for the payment of his debt, only under a *fieri facias;* under the custom, it is subjected to a preliminary attachment, under which it is so held as to deprive the owner of control over it, until the plaintiff's claim be secured or satisfied. At common law only tangible property can be subjected to execution; under the custom, a debt due to the defendant is attached, and appropriated to the payment of his debt. At common law, after obtaining judgment, the plaintiff is entitled to execution without any further act on his part; under the custom, he cannot have execution of the property or debt in the garnishee's hands, without giving pledges to refund to the defendant the amount paid by the garnishee, if the defendant, within a year and a day, appear and disprove the debt for which the attachment is obtained.

In these and other respects the proceeding under the custom has an individuality entirely foreign to the common law. Its peculiar features have in the main been preserved in its more enlarged and diversified development in this country. The most material

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differences as it exists among us are, the necessity of notice to the defendant, either actual or constructive; the direct action of the attachment on tangible property, as well as its indirect effect upon debts, and upon property in the garnishee's hands; the necessity for the presentation of special grounds for resort to it; and the requirement of a cautionary bond, to be executed by the plaintiff and sureties, to indemnify the defendant against damage resulting from the attachment. Still the remedy is, with us, regarded and treated as *sui generis*, and is practically much favored in legislation, though frequently spoken of by courts as not entitled to peculiar favor at their hands.

§ 4 *a*. Nothing more distinctly characterizes the whole system of remedy by attachment, than that it is — except in some States where it is authorized in chancery — a special remedy at *law*, belonging exclusively to a court of law, and to be resorted to and pursued in conformity with the terms of the law conferring it; and that where, from a conflict of jurisdiction, or from other cause, the remedy by attachment is not full and complete, a court of equity has no power to pass any order to aid or perfect it.[1]

§ 5. Under the custom, and likewise in this country, attachment is in the nature of, but not strictly, a proceeding *in rem;* since that only is a proceeding *in rem*, in which the process is to be served on the thing itself, and the mere possession of the thing itself, by the service of the process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever.[2] The original object of the London proceeding was, by attachment of the defendant's property instead of his body, to compel his appearance by sufficient sureties to answer the plaintiff's demand.[3] The practice of summoning him at the commencement of the proceeding, if it ever prevailed, was, in all probability, found to interfere with the advantage intended to be given by the attachment, and was, therefore, discontinued; but though the defendant is in fact never summoned, still the record of the proceedings in the Mayor's court must contain the return of *nihil*, or it

[1] McPherson *v.* Snowden, 19 Maryland, 197.

[2] Marshall, C. J., in Mankin *v.* Chandler, 2 Brockenbrough, 125; Megee *v.* Beirne, 39 Penn. State, 50.

[3] Ashley on Attachment, 11.

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will be erroneous and void.[1] All the notice, therefore, which the defendant there has of the proceeding, is derived through the attachment of his property; and herein is the leading difference between the London proceeding and ours. With us, the writ of attachment is always accompanied or preceded by a summons, which, if practicable, is served on the defendant; if not, he is notified by publication of the attachment of his property. If the summons be served and property attached, the latter, unless special bail be given, is held for the ultimate payment of such judgment as the plaintiff may recover, and that judgment is *in personam*, authorizing execution against any property of the defendant, whether attached or not. If the summons be served, but no property attached, the suit proceeds as any other in which the defendant has been summoned, unaffected by its connection with a fruitless attachment. If property is attached, but there be no service on the defendant, and he do not appear, publication is made, and the cause proceeds to final judgment, but affects only what is attached, and the judgment will not authorize an execution against any other property, nor can it be the foundation of an action against the defendant. If there be neither service upon the defendant nor attachment of his property, there is nothing for the jurisdiction to rest upon, and any proceedings taken in the cause are *coram non judice* and void.[2] Another essential difference between the two proceedings is, that while under the custom the defendant cannot appear and defend the action without entering special bail, such is not the case with us. Here, it is optional with him to give security for the payment of the debt or not; but in either event he is generally allowed to appear and defend. If he give the security, the same result follows as under the custom, — the dissolution of the attachment, the release of the attached property, and the discharge of the garnishee; if not, the property is the security, and remains in custody.

§ 6. Under the custom, the only preliminary affidavit to be made by the plaintiff, in order to his obtaining the attachment is, that the defendant is indebted to him in a specific sum. In this

[1] Locke on Foreign Attachment, 12.

[2] Eaton *v.* Badger, 33 New Hamp. 228; Carleton *v.* Washington Ins. Co., 35 Ibid. 162; Hopkirk *v.* Bridges, 4 Hening & Munford, 413; Miller *v.* Sharp, 3 Randolph, 41; Austin *v.* Bodley, 4 Monroe, 434; Maude *v.* Rodes, 4 Dana, 144; Hunt *v.* Johnson, Freeman, 282.

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country, he is generally required to swear, as well to the defendant's indebtedness as to some certain fact, designated by statute as a ground for obtaining the writ. Wherever this is requisite, it is the foundation of the exercise of jurisdiction through this process, and without it no legal step can be taken. The facts necessary to be sworn to are of great variety, and embrace many different phases of the same general allegations; having relation mainly to the residence of the defendant, and to proceedings on his part to avoid the service of process, or to dispose of his property adversely to his obligations to his creditors, and giving rise to a great variety of questions of general law and legal practice. It would be interesting to group together the various grounds of attachment established by the different States. Such a *résumé* would exhibit strikingly the degree to which the necessities of the country have led to the enlargement of the sphere of this remedy. Such, indeed, has been the almost uniform tendency of all legislation on this subject; and it is a noticeable fact, that it has exhibited itself in a more marked degree in the new States than in some of the old. Untrammelled by ancient forms, precedents, and traditions, their legislation has exhibited in this regard, as in others, the facility of adaptation to existing exigencies and circumstances which characterizes a new people, when free to form, and engaged in the work of forming, their own institutions. Hence, as experience has prompted, the grounds of attachment have been multiplied, until, in some States, there would hardly seem to be much more needed in this respect, unless, as in those of New England, preliminary attachment should be matter of right in every action *ex contractu*. At the same time the scope of the remedy, as to the causes of action for which it will lie, has been extended, and liberal provision has been made in a number of the States, for proceeding upon demands not due, in cases where a postponement of remedy until their maturity would endanger their collection; — a valuable measure, destined, probably, at no distant day, to become a part of the attachment laws of all our States.

§ 7. The tendency is not only to widen the sphere, but to enlarge the operation of the remedy, by subjecting to attachment interests in, and descriptions of, property not heretofore subject to execution at common law. Under the custom, as before remarked, the attachment reaches only effects or credits in the garnishee's

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hands; while universally, with us, it acts also, by direct levy, on the defendant's tangible property, real and personal. With us, too, generally, equitable interests in real estate may be attached; and recent legislation in several States authorizes the attachment, both directly and by garnishment, of *choses in action*, and the seizure of books of accounts, and the subjection of accounts and evidences of debt, by collection through a receiver, or other agent of the court, to the payment of the defendant's debt. At the same time there is a more extended disposition manifested to give to garnishment — what it has under the custom — a prospective operation upon effects coming into the garnishee's hands between the time of service on him and the time of filing his answer.

§ 8. The natural result of the matters thus briefly noticed is, to give this remedy a high practical importance, and to lead to a voluminous mass of judicial decisions, extending over a wider surface, and bringing into view a greater variety of legal doctrines, than would be conjectured by those who have not examined the subject. In relation to it there can, in the nature of our institutions, be no uniform system of statute law; but notwithstanding the inevitable diversity in this particular, there is a general unity of aim and result; so that principles and rules of identical import may be — and in numberless instances are — judicially established, under statutes widely differing in details. Indeed, it may be questioned whether there is any other subject of equal extent, in the administration of the law, depending so entirely upon, and so exclusively regulated by, statutory provisions, that would exhibit less diversity of judicial decision than is connected with this. It is, therefore, a work of interest, to present in a connected form the emanations of the judicial mind in all parts of our country, in relation to a proceeding which belongs to every system of State laws, and is everywhere resorted to in aid of creditors who, without it, would often have no adequate means of enforcing their claims.

With these general remarks we proceed to the practical consideration of the subject.

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CHAPTER II.

FOR WHAT CAUSE OF ACTION AN ATTACHMENT MAY ISSUE.

§ 9. By the custom of London all attachments are grounded upon actions of debt.[1] And the debt must be of such a nature as will sustain an action at law. Equitable debts, therefore, are not sufficient to ground an attachment upon; such, for instance, is a legacy, which is recoverable only in the spiritual court or in a court of equity. Dividends due to a creditor from the assignees under a commission of bankruptcy, are also in the same predicament, as is all trust property, for the creditor cannot sue for these at law, but must either petition the chancellor, or file a bill in equity to recover them. The debt also must be due, or it cannot sustain an attachment. Thus no attachment can be made upon a bond, bill, or note, the day of payment whereof is not yet come; nor for a book debt for payment of which time has been given, until such time be elapsed.[2]

§ 10. In this country, resort to this process is in general allowed only to "*creditors*." It has, therefore, been uniformly held, that an attachment will not lie for any cause of action founded in *tort*. Thus, it has been decided that it cannot issue in an action of trover,[3] or trespass;[4] nor for a malicious prosecution;[5] nor for assault and battery;[6] nor to recover the amount of expenses incurred for medical and surgical services, and loss of time during confinement, resulting from a wound inflicted by the defendant;[7] nor for damages alleged to have been sustained by the plaintiff, in consequence of a wrongful sale of his property under execution;[8]

[1] Privilegia Londini, 254.

[2] Ashley on Attachment, 21, 22.

[3] Marshall *v.* White, 8 Porter, 551; Hynson *v.* Taylor, 3 Arkansas, 552; Hutchinson *v.* Lamb, Brayton, 234.

[4] Ferris *v.* Ferris, 25 Vermont, 100.

[5] Stanly *v.* Ogden, 2 Root, 259; Hynson *v.* Taylor, 3 Arkansas, 552; Tarbell *v.* Bradley, 27 Vermont, 535.

[6] Minga *v.* Zollicoffer, 1 Iredell (Law), 278; Thompson *v.* Carper, 11 Humphreys, 542.

[7] Prewitt *v.* Carmichael, 2 Louisiana Annual, 943.

[8] Greiner *v.* Prendergast, 3 Louisiana Annual, 376.

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nor for damages caused by a collision between two steamboats;[1] nor for damages sustained by a steamboat running into and destroying plaintiff's house;[2] nor to recover from common carriers damages for the loss of a trunk, where the declaration is in *tort* and not in contract;[3] nor in an action on the case for money of the plaintiff stolen by the defendant;[4] nor in an action for damages for the alleged wrongful and fraudulent act of the defendant, in breaking open a letter intrusted to his care by the plaintiff;[5] nor in an action for the recovery of specific property;[6] nor in an action for slander, under a statute authorizing an attachment for torts, trespasses, or injuries actually done to property, real or personal.[7] In all such cases, the rule laid down by the Supreme Court of Wisconsin is undoubtedly correct, that though the plaintiff should, in his affidavit for obtaining the attachment, allege a cause of action founded on contract, yet whenever it appears, either from the declaration or the evidence, that the true cause of action is not of that character, it is the duty of the court to dismiss the suit.[8]

[1] Swagar *v.* Pierce, 3 Louisiana Annual, 435; Griswold *v.* Sharpe, 2 California, 17.

[2] Holmes *v.* Barclay, 4 Louisiana Annual, 63; McDonald *v.* Forsyth, 13 Missouri, 549. See Irish *v.* Wright, 12 Robinson (La.), 563; Hill *v.* Chatfield, 4 Louisiana Annual, 562.

[3] Porter *v.* Hildebrand, 14 Penn. State, 129. See Strock *v.* Little, 45 Ibid. 416.

[4] Piscataqua Bank *v.* Turnley, 1 Miles, 312.

[5] Raver *v.* Webster, 3 Iowa, 502.

[6] Hanna *v.* Loring, 11 Martin, 276.

[7] Sargeant *v.* Helmbold, Harper, 219; Baune *v.* Thomassin, 6 Martin, N. S. 563.

[8] Elliott *v.* Jackson, 3 Wisconsin, 649. The restriction of the remedy by attachment to creditors, is of course dependent upon the terms of the governing statute; which may be, and in some States are, apparently sufficiently comprehensive to authorize an attachment in an action founded on tort. For instance, in New York, under its Code of Procedure, allowing an attachment "in an action *for the recovery of money*," the question arose whether those words authorized an attachment in an action for a wrong; and, as is the case in regard to many subjects which have come before the courts of that State, we find reported decisions *on both sides*, with, as yet, no final adjudication by the court of last resort. In 1850, in Hernstien *v.* Matthewson, 5 Howard Pract. R. 196, in the Supreme Court, EDMONDS, J. decided that the Code allowed an attachment against a non-resident defendant in every action, whether for a wrong or on contract. In 1859, in Gordon *v.* Gaffey, 11 Abbott Pract. R. 1, HOGEBOOM, J. held that an attachment did not lie in an action for setting fire to the barn of the plaintiff, whereby the same, with all its contents, was consumed. In 1860, in Floyd *v.* Blake, 11 Abbott Pract. R. 349, JAMES, J. sustained an attachment in an action for assault and battery. In 1865, in Shaffer *v.* Mason, 29 Howard Pract. R. 55, INGRAHAM, SUTHERLAND, and CLARKE, JJ. decided that an attachment would not lie in an action of trespass *de bonis asportatis*. And so the matter stands *in equilibrio*. When the Court of Appeals of that State shall have decided the question, it will be time enough to announce what is *the law* there on this subject

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§ 11. Before proceeding to the main subject of inquiry, it may be remarked, that in the absence of any statutory provision to the contrary, non-residents as well as residents may avail themselves of the proceeding by attachment to secure debts due them.[1] And where the remedy is allowed only to residents, and the non-residence of the plaintiff does not appear on the face of the proceedings, the defendant can avail himself of it only by a plea in abatement.[2]

§ 12. Who may be regarded as a *creditor*, may be often a debatable question. A creditor is defined by a recent writer to be one who has a right to require of another the fulfilment of a contract or obligation.[3] Another writer considers a creditor to be one who gives or has given credit to another; one who trusts another; one to whom a debt is due: in a larger sense, one to whom any obligation is due.[4] Webster defines the word thus: "A person to whom a sum of money or other thing is due, by obligation, promise, or in law." In the Civil Law, he is said to be a debtor, who owes reparation or damages for the non-performance of his contract;[5] and of necessity he is a creditor who has the right to claim such reparation or damages. The word is certainly susceptible of latitudinous construction, and it is not perhaps as important here to arrive at its general meaning, as to ascertain the views of it, and of what constitutes an indebtedness, which have received judicial sanction, in connection with the resort to an attachment.[6]

[1] Woodley *v.* Shirley, Minor, 24; Tyson *v.* Lansing, 10 Louisiana, 444; Posey *v.* Buckner, 3 Missouri, 413; Graham *v.* Bradbury, 7 Ibid. 281.

[2] Calhoun *v.* Cozzens, 3 Alabama, 21.

[3] 1 Bouvier's Law Dictionary, 383.

[4] 1 Burrill's Law Dictionary, 301.

[5] Hunt *v.* Norris, 4 Martin, 532; 1 Pothier on Obligations, 159.

[6] As the relation of debtor and creditor rests upon the existence, in some shape or other, of a *debt*, there are collateral sources from which, in addition to the direct adjudications presented in the text, we may draw illustrations of the meaning of that word. It is a word in common use, and must needs have a natural, plain, and ordinary signification; and wherever, as in connection with the subject of attachment, it occurs in a statute, it comes within the principle of construction expressed in Dwarris on Statutes, p. 573, that "the words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and popular use"; and laid down by Kent, that "the words of a statute, if of common use, are to be taken in their natural, plain, obvious, and ordinary signification and import."

Blackstone says, "The legal acceptation of *debt* is, a sum of money due by certain and express agreement: as by a bond for a determinate sum; a bill or note; a special bar-

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§ 13. In New York, where the plaintiff was required to swear that the defendant is *indebted* to him, the court said it did not

gain; or a rent reserved on a lease: where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it."

This, however, is not the popular acceptation of the word. In general use it is not regarded as a technical word, nor written or spoken in a restricted or technical sense; but is universally employed as expressing whatever one man *owes* another, in any form of liability arising *ex contractu*. This, too, is its signification, as given by all English lexicographers. Resorting to them we find the following definitions: —

By Johnson and Walker: "That which one man owes another." *By Barclay:* "That which one person owes another." *By Bailey:* "What is due from one person to another." *By Richardson:* "Any thing had or held of or from another, his property or right, his due; that which is owed to him; which ought at some time to be delivered or paid to him." *By Webster:* "That which is due from one person to another, whether money, goods, or services." *By Worcester:* "That which one person owes to another; due; obligation." *By Tomlin:* "Debt, in common parlance, is a sum of money due from one person to another." And in 1 Bouvier's Institutes, § 575, it is said: "He toward whom an obligation has been contracted, is called the *obligee* or *creditor*, and he who is bound to fulfil it is the *obligor* or *debtor*."

These definitions, identical in spirit, and almost in terms, were substantially adopted by the Supreme Court of Massachusetts, in Gray *v.* Bennett, 3 Metcalf, 522, 526, where the question presented was, whether the right of action which an insolvent debtor has, in that State, to recover threefold the amount of interest paid by him on a usurious contract, was a debt which passed by an assignment under the statute to the assignee, so as to enable him to maintain a bill in equity to recover the same. The court held that it was, and said: "The word debt is of large import, including not only debts of record, or judgments, and debts of specialty, but also obligations under simple contracts to a very wide extent; and *in its popular sense includes all that is due to a man under any form of obligation or promise.*"

The law of Bankruptcy sheds light on this subject. In Scotland, in the proceeding of séquestration taken by a creditor to force his debtor into bankruptcy, the question would necessarily arise as to the nature of the debt which would enable a creditor to take such a step. BELL, in his Commentaries (Vol. II. p. 319), thus treats of the "nature and amount of the petitioning creditor's debt."

"*Nature of the debt.* — Debts are of three kinds: pure, future, and contingent. A pure debt is one arising on an obligation or engagement, of which the term of payment has arrived; and of which debt, consequently, payment may be immediately enforced. . . . .

"But a debt may have been incurred, and may be actually due, while the amount may not be ascertained, or capable of being so stated as to be precisely demandable, without the aid of a court of justice. Such are certain claims of damages. Something has already been said of claims of damages (Vol. I. p. 654), and a distinction may be marked here, between damages for breach of contract and reparation of injury from *delict* and *quasi delict*.

"Where a claim of damages arises by convention or breach of contract, the amount may sometimes be brought to a certain test or criterion; and in such cases it may be doubted whether the person entitled to such damage may not swear to its amount as a debt, to the effect of sustaining a petition for sequestration; as it is not a debt of which either the existence or the amount depends upon a contingency still unascertained. Thus, the loss sustained by non-delivery of a cargo of corn according to agreement forms a claim of debt for reparation, ascertainable, at once, by an event already passed, namely, the market price of grain, or by the amount of the sum actually paid for a like quantity rendered necessary for fulfilling the creditor's collateral contracts. So the damage occasioned by failure to build a house may be the sum which has actually been paid to another to supply the place of the contractor."

This subject has received attention in connection with laws existing in some States,

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follow that the demand is to be so certain as to fall within the technical definition of a debt, or as to be susceptible of liquidation

imposing personal liability on stockholders, for debts of corporations. In Massachusetts, under a statute requiring every corporation to give notice, annually, in some newspaper, of the amount of all assessments voted by said corporation, and actually paid in, and all existing debts, and declaring that if any corporation should fail to comply, the members thereof should be personally liable for any debt then due, the meaning of the word debt was considered, in connection with a question of the competency of a witness. The action was in assumpsit, against a corporation, for unliquidated damages, for breach of contract. The corporation offered as a witness a person who was one of its members when the cause of action arose; but it appeared that no notice had been published as required by the statute, and his admissibility was contested on the ground of his personal liability for the demand of the plaintiff against the company. The court held him, for that reason, incompetent as a witness, and in the course of its opinion thus summarily disposed of one of the points made by the company: "For, though the question was made, whether such a claim for unliquidated damages is a debt, within the meaning of the statute, we do not think that it admits of a reasonable doubt that all such claims for damages were intended to be included in the term 'debts.'" Mill-Dam Foundery *v.* Hovey, 21 Pick. 417, 455.

Again, in Carver *v.* Braintree Man. Co., 2 Story, 432, this question came before Justice STORY, under circumstances of a similar nature, and he discussed the meaning of the word debt at much length, and with his usual ability, and gave it a very extended construction. The action was in *tort*, for an infringement of a patent. At the trial, one Edson, who was a member of the corporation (the defendant) at the time of the supposed infringement, but had since sold out his interest, was offered as a witness for the corporation, but his testimony was rejected, because he still had an interest in the event of the suit. On a motion for a new trial, the propriety of this ruling was carefully considered, and from the decision of the court the following extract is made.

"The remaining objection is to the rejection of the testimony of Edson. And here it is that I have entertained some doubt, upon which I was desirous of hearing the further argument which has now been had.

"The defendants were created a corporation by the statute of Massachusetts of the 14th of June, 1823, and were, of course, made subject to all the liabilities and requirements of the general statute of 1821, ch. 28, respecting the liabilities of manufacturing corporations. That statute provides 'that every person who shall become a member of any manufacturing corporation, which may be hereafter established in this commonwealth, shall be liable in his individual capacity for all debts contracted during the time of his continuing a member of such corporation.' The question turns, therefore, upon the meaning of the words, 'debts contracted,' in the statute. Do they mean literally and strictly, such debts as are due and payable in money, *ex contractu*, by the positive or implied engagements of the corporation, and resolve themselves into liquidated or determinate sums of money, due as debts, or do they extend to all legal liabilities incurred by the corporation, and which, when fixed by a judgment, or award, or otherwise, are debts of the corporation? And if the latter be the true meaning, then does the statute liability exist only from the time when it becomes an ascertained debt of the corporation, or does it relate back to the origin of the liability, and bind the corporators from that time?

"If the words 'debts contracted,' in the statute, are to receive the limited construction, that they are applicable only to debts in the strict sense of the term, that is, contracts of the party for the payment of money, and nothing else, it is obvious, that for the purposes of the statute, which although in some sense it may be deemed penal, is also in another sense remedial, would be comparatively of little value. Suppose the case of a contract by the corporation to do work, or to manufacture goods of a particular quality or character, or to furnish materials, or to buy cotton or wool undelivered,

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without the intervention of a jury. Being *indebted* is synonymous with *owing;* it is sufficient, therefore, if the demand arise on con-

or to build houses, or to employ workmen, and the contract should be entirely unperformed and broken, and refused to be performed, so that the right of the other party would be, not to money, but to unliquidated damages for the non-performance or refusal to perform; if these, which are by no means uncommon contracts, should be without the purview of the statute, it would have a very narrow and inadequate range and operation. Yet such cases sound merely in damages. Suppose a manufacturing corporation to obstruct its neighbor's mill privilege, or stop his mill works, by back flowage, if such acts be not within the protection of the statute, we see, at once, that an insolvent corporation might do irreparable mischief without any just redress to the other party. Suppose such an insolvent corporation should unlawfully, under an unfounded claim of right, convert 100 or 1,000 bales of cotton belonging to a third person, we see that the mischief could be redressed only by an action of trover for unliquidated damages; and if the individual corporators were not liable therefor, after an unsatisfied judgment, the statute would be little more than a delusion. If, on the other hand, we should construe the statute broadly as a remedial statute, and give to the word 'debts' a meaning not unusual, as equivalent to 'dues,' and to the word 'contracted' a meaning, which, though more remote, is still legitimate, as equivalent to 'incurred'; so that the phrase 'debts contracted,' in this sense would be equivalent to 'dues owing,' or 'liabilities incurred,' the statute would attain all the objects for which it seems designed. The Supreme Court of Massachusetts, in the Mill-Dam Foundery *v.* Hovey, 21 Pick. 455, held, under the statute of 1829, ch. 53, sec. 6, which makes the stockholders liable for the debts of the corporation, that the term 'debts' included a claim for unliquidated damages. That was a case arising *ex contractu*; but the language certainly extends the term 'debts' beyond its close and literal meaning. And if it covers cases of unliquidated damages, *ex contractu*, it is difficult to say why it should stop there, and not go further and cover cases of unliquidated damages arising from torts to property. In each case there is no debt until the damages are ascertained and liquidated; and then the debt seems to relate back to its origin. Blackstone says, 'a debt of record is a sum which appears to be due by the evidence of a court of record; thus, when any specific sum is adjudged to be due from the defendant to the plaintiff in an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of judicature.' Here Blackstone manifestly included all sorts of actions or suits, where the judgment is for a sum certain, whatever may be its nature or origin.

"I agree that it is no part of the duty or functions of courts of justice, to supply the deficiencies of legislation, or to correct mischiefs which they have left unprovided for. That is not the question here. But the question is, whether, if the words of a statute admit of two interpretations, one of which makes the legislation incomplete for its apparent object, and the other of which will cover and redress all the mischiefs, that should be adopted, in a statute confessedly remedial, which is the most narrow, rather than that which is the most comprehensive, for the reason only, that the latter will create an obligation or duty, beyond what is imposed by the common law.

"It seems clear, that, in common parlance, as well as in law, the term is in an en larged sense sometimes used to denote any kind of a just demand. And in the Roman law, it had sometimes the like enlarged signification. *Sed utrum ex delicto an ex contractu Debitor sit, nihil refert*, says the Digest.

"Upon this subject, I confess, that, with all the lights which have been thrown upon the question by the able arguments at the bar, I am not without some lurking doubts. But having reflected much upon the subject, and being in the same predicament which Lord Eldon is said to have suggested as having sometimes occurred to himself, that he felt doubts, but was unable to solve them to his own entire satisfaction, I have at length come to the conclusion that the rejection of the witness as an interested witness was

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tract. It was therefore held, that an attachment would lie in an action founded on a bill of lading, whether the goods shipped were not delivered, or were delivered in a damaged condition.[1]

§ 13 *a*. In Connecticut, where the remedy by attachment is confined to "creditors," it was held, that it was available for the recovery of a claim for unliquidated damages for the negligence of the defendants in towing a raft of logs from New York to New Haven, through Long Island Sound, which the defendants had agreed to tow safely; by means of which negligence the raft was broken up and the logs scattered, and a large part lost, or recovered at a great expense.[2]

§ 14. In Pennsylvania, under a statute which, by a strict and literal construction, confined the writ of attachment to cases of debt, the following case arose. The defendant bound himself to deliver to the plaintiff teas of a certain quality, and suited to a particular market; and on failure to do so, to pay the difference between teas of such quality and such as should be delivered. Teas agreeably to contract were not delivered; and the plaintiff commenced suit by attachment, swearing that the difference amounted to $4,500. It was held, that this was a debt within the meaning of the statute, for which an attachment would lie. "It is not every claim," said the court, "that, upon a fair con-

right. I follow out the doctrine in the case of the Mill-Dam Foundery *v.* Hovey, which, as far as it goes, disclaims the interpretation of the word 'debt,' as limited to contracts for the payment of determinate sums of money. Passing that line, it does not seem to me easy to say, that if cases of unliquidated damages may be treated as debts, because they end in the ascertainment of a fixed sum of money, that we are at liberty to say that the doctrine is not equally applicable to all cases of unliquidated damages, whether arising *ex contractu* or *ex delicto*. If ultimately it ends in a debt, as a judgment for damages does, that case asserts that its character as a debt relates back to its origin. Besides, it seems to me upon principle to be reasonable, if not absolutely justified by authority, to hold, that if the transaction occurs while a person is a member of the corporation, and he would, if he remained a member, be liable for the ultimate debt adjudged, it may well be treated as an inchoate debt, consummated by the judgment. Since the argument was had, my attention has been called to the case of Gray *v.* Bennett, 3 Metcalf, 522, which, in several respects, confirms the reasoning which I had previously adopted, in relation to the meaning of the word 'debt,' and the construction which it ought to receive in a remedial statute. If I had seen the case at an earlier period, it would have somewhat abridged my own researches on the same subject."

From these citations, as well as those in the text, we are justified in considering that the word *debt* has, at this time, and in this country, a much more extended signification than was allowed to it when Blackstone gave it the definition above quoted.

[1] Lenox *v.* Howland, 3 Caines, 323; *In re* Marty, 3 Barbour, 229.

[2] New Haven Saw-Mill Co. *v.* Fowler, 28 Conn. 103.

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struction of this law, or even in common parlance, can be denominated a debt. For, in the first place, the demand must arise out of a contract, without which no debt can be created; and the measure of the damages must be such as the plaintiff can aver to be due; without which, special bail cannot regularly be demanded."[1] If, upon the facts sworn to, a contract does not appear, or cannot be necessarily implied, an attachment will not lie.[2]

§ 15. In Maryland, under a statute requiring the plaintiff to make oath that the defendant is *bonâ fide* indebted to him, it was held, that the term "indebted" was not to be construed in a technical or strict legal sense; but that where the contract sued upon furnished a standard by which the amount due could be so clearly ascertained as to enable the plaintiff to aver it in his affidavit, or the jury, by their verdict, to find it, an attachment might issue.[3]

§ 16. In Virginia this case occurred. A deposited with B, on storage, a quantity of flour, to be re-delivered on demand. B's warehouse took fire, and, with the flour, was consumed. A sued by attachment in chancery, to recover the value of the flour. It was objected that the court had no jurisdiction, because the claim was not a debt; but the Court of Appeals overruled the objection and sustained the proceeding.[4]

§ 17. In Alabama, where the statute used the words "debt or demand," and required the plaintiff "to swear to the amount of the sum due," it was held, that an action might be commenced by attachment, to recover for a breach of warranty of the soundness of a slave; the damage for the breach of warranty being the value of the slave at the time of the warranty, and a sum capable of ascertainment, and of which the plaintiff might make affidavit; and the cause of action arising out of contract, and the measure of the damages being ascertained by the law of the contract.[5] In the same State, under another provision, authorizing one non-resident to sue another non-resident by attachment, where the defendant is *indebted* to the plaintiff, either by judgment, note, or

[1] Fisher v. Consequa, 2 Washington, C. C. 882. See Redwood v. Consequa, 2 Browne, 62; Carland v. Cunningham, 37 Penn. State, 228.

[2] Jacoby v. Gogell, 5 Sergeant & Rawle, 450.

[3] Wilson v. Wilson, 8 Gill, 192.

[4] Peter v. Butler, 1 Leigh, 285.

[5] Weaver v. Puryear, 11 Alabama, 941

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otherwise, it was held, that those terms did not extend beyond causes of action for which either debt or *indebitatus assumpsit* would lie.[1]

§ 18. In Mississippi, where the "creditor" was required "to make oath to the amount of his debt or demand," it was held, that an attachment would lie to recover damages for a breach of covenant.[2]

§ 19. In Louisiana, under a statute which authorized an attachment to issue "whenever a petition shall be presented for the recovery of a debt," an action was brought by attachment to recover the value of certain goods shipped on a steamboat, and not delivered according to the terms of the bill of lading; and the case was considered to be within the statute; the court holding that all obligations arising from contract, express or implied, either for the payment of money or the delivery of goods, create a debt on the part of the obligor, for which an attachment may issue, whenever the amount may be fairly ascertained by the oath of the obligee.[3]

In the same State, it was held, that an attachment would lie, in an action by the purchaser against the vendor of a slave, alleged to have absconded from the plaintiff, and to have returned to the vendor, who harbored him and refused to give him up, to recover the value of the slave, and of his services during his detention, and damages for expenses incurred in demanding him, and for counsel fees: the court holding that the retention of the slave was a violation of the contract of sale, and that the responsibility thereby incurred was not diminished by an outrage, perhaps a crime, being superadded to it.[4] The law under which the writ was sued out in this case was Art. 242 of the Louisiana Code of Practice, in these words: "The property of a debtor may be attached in the hands of third persons by his creditors, in order to secure the payment of a debt, whatever may be its nature, whether the amount be liquidated or not, provided the term of payment have arrived, and the creditor who prays the attachment state expressly and positively the amount which he claims"; and Art. 243 requires the creditor to "declare under oath the amount of

[1] Hazard *v.* Jordan, 12 Alabama, 180.
[2] Woolfolk *v.* Cage, Walker, 300.
[3] Hunt *v.* Norris, 4 Martin, 517.
[4] Crane *v.* Lewis, 4 Louisiana Annual, 320.

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the sum due him." Under this law it was held, that an attachment would lie in favor of the owner of a ship, against the owner of a dock, for failure to fulfil a contract by the latter for the services of his dock for the use of the plaintiff's ship.[1]

In the same State it was held, that an attachment might be sued out, to recover the value of books delivered to the defendant to be bound, and which he failed to return.[2]

And again, under a statute authorizing an attachment "in every case where the debt, damages, or demand is ascertained and specified," it was held, that attachment would lie to recover damages sustained by the malfeasance of one in the employ of the plaintiff, whose good conduct the defendant had guaranteed. The court in disposing of the matter said: "By the wording of the statute, some cases of damages were to be excluded, but then it is equally clear that some were intended to be included; and we think this is one of them. To require that the damages should be ascertained, and made specific by the act of the party sued, would be to render the words in the statute useless; for the moment this liquidation took place, they would cease to be damages, and become a debt. The act, therefore, contemplated that the sum due should be settled by the oath of the plaintiff in all those cases where he could ascertain it. And the cases in which he can do so, we should consider those where the amount does not depend on an opinion of the wrongs inflicted on his feelings, reputation, or person, but on a knowledge of the injuries done to his property."[3]

§ 20. In Arkansas, where an attachment was allowed when any person "is indebted," it was held, that the term "indebted" is synonymous with *owing*, and that attachment might be maintained upon an unliquidated as well as a liquidated demand, arising *ex contractu*, that might be rendered certain. The case was an action for damages for breach of a contract to tow a boat up Red River, and deliver certain loads of corn at certain places specified in the contract.[4]

§ 21. In Indiana, under a statute authorizing attachment for

[1] Hyde v. Higgins, 15 Louisiana Annual, 1.
[2] Turner v. Collins, 1 Martin, N. S. 369.
[3] Cross v. Richardson, 2 Martin, N. S. 323.
[4] Jones v. Buzzard, 2 Arkansas, 415.

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"debts or other demands," it was decided, that a claim for damages for an injury to flour, while in possession of the defendant as a common carrier, and in the course of transportation, was a cause of action for which an attachment would lie.[1]

§ 22. In Michigan, the statute authorizes an attachment, upon an affidavit being made that the defendant is indebted to the plaintiff, and specifying, as near as may be, the amount of such indebtedness, over and above all legal set-offs, and that the same is due upon contract, express or implied, or upon judgment. Under that statute a plaintiff in attachment filed a declaration, counting upon the breach of an express contract for freight of certain vessels, claiming damages therefor, and for demurrage, and upon the common counts in *indebitatus assumpsit*, for the use of said vessels, retained and kept on dunnage, and a *quantum meruit* count, for use, &c. The court, in considering the question whether the declaration disclosed a cause of action which would sustain an attachment, used the following language: "What is an indebtedness? It is the owing of a sum of money upon contract or agreement, and in the common understanding of mankind, it is not less an indebtedness that the sum is uncertain. The result of a contrary doctrine would be to hold any liability which could only be the subject of a general *indebitatus assumpsit*, *quantum meruit*, or *quantum valebant* count in a declaration, such an indebtedness as could not be the subject of this remedy by attachment. Without fully deciding this point, which is not necessarily raised in this case, we see no reason why a demand arising *ex contractu*, the amount of which is susceptible of ascertainment by some standard referable to the contract itself, sufficiently certain to enable the plaintiff, by affidavit, to aver it as near as may be, or a jury to find it, may not be a foundation of a proceeding by attachment. In the present case the contract furnishes such standard, equally as does any contract for goods sold, or work or labor done, without express agreement as to price or compensation."[2]

§ 23. In Illinois, under a statute which authorizes an attachment to issue where "any creditor shall file an affidavit, setting forth that any person is indebted to him, stating the nature and amount of such indebtedness, as near as may be," it was held,

[1] Bausman v. Smith, 2 Indiana, 374. [2] Rodofson v. Hatch, 3 Michigan, 277.

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that an action of account might be instituted by attachment, by one partner in a commercial adventure against another. The court remarked: "The law was designed to furnish a creditor with the means of collecting his debt, in a case where he would be unable to do so in the ordinary mode of proceeding, and we can see no reason why it should not be as applicable to actions of account as to any other class of cases. The claim of a joint-tenant, tenant in common, or coparcener, is just as sacred as that of any other creditor; and because he cannot resort to the more usual common law actions to enforce his rights, affords no reason why he should be deprived of the benefit of the attachment act, when he presents a case that would authorize an attachment, were he permitted to sue in debt or assumpsit.

"As to the sufficiency of the affidavit there can be no question. After setting forth the dealings between the parties, and the nature of the indebtedness, with great particularity, it alleges that the defendant, by means of the premises, is indebted to the plaintiff in a sum stated, and that the defendant is not a resident of the State. Upon such an affidavit an attachment may properly issue."[1]

In Louisiana, however, it is held, that an action by attachment, by one general partner against another, for an amount alleged to be due, growing out of the transactions of the partnership, cannot be maintained.[2] And so in South Carolina.[3]

In New York an action was instituted by one against his former copartner, and the complaint alleged the former partnership, a dissolution thereof, an assignment of the plaintiff's interest to the defendant, and the defendant's agreement to pay the partnership liabilities, &c., and divide the surplus; that the surplus was large; that the defendant had applied the assets to his own private use, and refused to render any account to plaintiff; that a large sum of money was due to plaintiff, *but he could not state the amount;*

[1] Humphreys *v.* Matthews, 11 Illinois, 471. See remarks of SLIDELL, J., in Brinegar *v.* Griffin, 2 Louisiana Annual, 154.

[2] Levy *v.* Levy, 11 Louisiana, 581; Brinegar *v.* Griffin, 2 Louisiana Annual, 154; Johnson *v.* Short, Ibid. 277.

[3] Rice *v.* Beers, 1 Rice's Digest of South Carolina Reports, 75. This case cannot probably be found in any of the volumes of the South Carolina Reports, but it is no doubt authentic. Mr. Rice's Digest contains many cases decided in South Carolina, and nowhere else reported. In that State they are often referred to in the opinions of the Court of Appeals as authoritative. Whoever would understand the reason of the absence of those cases from the Reports, is referred to the Preface to Nott & M'Cord's Reports

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and he demanded an account, and that the defendant pay what, upon the accounting, might be found due. Long after the action was instituted, the plaintiff obtained an attachment, upon an affidavit alleging that more than $25,000 was due him from the defendant. A supplementary affidavit stated the amount at $22,000. A motion to discharge the attachment was sustained, because the plaintiff, in stating the grounds of his claim, disclosed that he did not know, and could not know until an account had been taken, what, or in fact whether anything, was due him; and that his mere opinion or belief was not sufficient to warrant the granting of the process.[1]

§ 24. The debt for which an attachment may issue must possess an actual character, and not be merely possible, and dependent on a contingency which may never happen. Therefore, where the plaintiff alleged as a ground for obtaining an attachment, that he was security upon a draft drawn for the defendant in the sum of $900, and that the defendant was about to remove himself out of the State, so that the ordinary process of law could not be served on him, and that thereby the plaintiff would probably have the draft to pay, or suit would have to be brought for the same in another State; it was held, that the attachment could not be sustained.[2]

§ 25. And though, as in some States, an attachment will lie on a debt not due, yet there must be an actual subsisting debt, which will become due by the efflux of time. Therefore, where suit was brought on the 4th of February, by the drawer against the acceptor of bills of exchange, which had been protested before, but were not taken up by the drawers until some days after that day, though on that day an agreement was made by the drawers to take them up; it was held, that the drawers could maintain no action until

[1] Ackroyd *v.* Ackroyd, 11 Abbott Pract. R. 345; s. c. 20 Howard Pract. R. 93; Guilhon *v.* Lindo, 9 Bosworth, 601.

[2] Benson *v.* Campbell, 6 Porter, 455; Taylor *v.* Drane, 13 Louisiana, 62; Harrod *v.* Burgess, 5 Robinson (La.), 449. In Moore *v.* Holt, 10 Grattan, 284, in a proceeding by attachment *in chancery*, authorized by the laws of Virginia, it was decided, that a guarantor might maintain a bill against the principal debtor, in order to protect himself against loss by reason of the debtor's failure, before he has actually been subjected to liability as guarantor. This doctrine, however, is sustainable only on equitable grounds, under equity jurisdiction, and has not, so far as I have discovered, been recognized as applicable to a proceeding at law.

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the bills were actually taken up, and that the completion of the agreement could not relate back to the time it was made, and reinvest the drawers with the title to the bills on the 4th of February.[1] And so, where a creditor, for the accommodation of his debtor, accepted a bill drawn by the debtor, payable a certain number of days after date, for the amount of the debt, with interest to maturity, and the bill was discounted by a bank, and the proceeds applied to the extinguishment of the original debt; it was decided, that the acceptor was not a creditor of the drawer until the maturity of the bill and his payment of it; and that his payment of it at maturity could not retroact so as to give validity to an attachment sued out by him before the payment.[2]

§ 26. In New York this case arose. A. agreed with B., that if B. would sell him goods on credit, and also guarantee his liability to C. for a certain sum, he would ship and consign to B. all the fish he should become possessed of in his business in Nova Scotia, as security for the guaranty and the goods to be sold to him. B. sold him the goods on credit, and became guarantor to C., and afterwards A. sent fish from Nova Scotia, but refused to consign them to B.; whereupon, and before the term of credit had expired, B. obtained an attachment against A. It was objected that no cause of action existed until the expiration of the credit on the sale of the goods, and that therefore the attachment should be discharged; but the court held, that the contract to give security was broken, and an action might then be sustained for the breach of it, without any reference to the time of the credit, except that if a judgment were obtained before the credit expired, the court had sufficient equity powers over its own judgments to postpone the collection of the amount of the judgment until the credit should expire, or to vacate it, if the security agreed on should be given.[3]

§ 27. In a case which went up to the Supreme Court of the United States from Louisiana, the following facts were presented. B., of Charleston, South Carolina, being indebted to Z. & Co., of New Orleans, for the proceeds of a cargo of sugar consigned to him, Z. & Co. drew on him certain bills of exchange, which were

[1] Blanchard v. Grousset, 1 Louisiana Annual, 96.

[2] Read v. Ware, 2 Louisiana Annual, 498; Price v. Merritt, 13 Ibid. 526; Todd v. Shouse, 14 Ibid. 426.

[3] Ward v. Begg, 18 Barbour, 139.

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accepted, for the full amount of those proceeds, and were all negotiated to third persons, and were outstanding, and three of them were not yet due, when B. made an assignment for the benefit of his creditors. Z. & Co., upon hearing of it, brought suit against B. for the full amount of the proceeds of the cargo of sugar, and attached his property. The question was, whether, under the law of Louisiana allowing an attachment to be sued out upon a debt not yet due, this attachment could be maintained. The court said: "It is plain to us that there was no debt due Z. & Co. at the time when the attachment was made. The supposed debt was for the proceeds of a cargo of sugar and molasses, sold by B. on account of Z. & Co. Assuming those proceeds to be due and payable, Z. & Co. had drawn certain bills of exchange upon B. which had been accepted by the latter, for the full amount of those proceeds; and all of these bills had been negotiated to third persons, and were then outstanding, and three of them were not yet due. It is clear, upon principles of law, that this was a suspension of all right of action in Z. & Co., until after those bills had become due and dishonored, and were taken up by Z. & Co. It amounted to a new credit to B. for the amount of those acceptances, during the running of the bills, and gave B. a complete lien upon those proceeds, for his indemnity against those acceptances, until they were no longer outstanding after they had been dishonored.

"It is true the statute law of Louisiana allows, in certain cases, an attachment to be maintained upon debts not yet due. But it is only under very special circumstances; and the present case does not fall within any predicament prescribed by that law. The statute does not apply to debts resting in mere contingency, whether they will ever become due to the attaching creditor or not."[1]

§ 28. In Ohio, under a provision allowing an attachment to be obtained in certain cases before the debt has become due, it was decided, that the holder might proceed in that way against the indorser of a negotiable note; the court regarding the latter as a debtor within the meaning of the statute.[2]

§ 29. In Massachusetts, a question arose as to the time when a

[1] Black *v.* Zacharie, 3 Howard, Sup. Ct. 483; Denegre *v.* Milne, 10 Louisiana Annual, 324; Henderson *v.* Thornton, 37 Mississippi, 448.

[2] Smead *v.* Chrisfield, 1 Handy, 442.

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demand was due, so as to be sued upon. A. accepted bills for the accommodation of B., and paid them on the second day of grace, and on the morning of the third day of grace sued out an attachment against B., to recover the money so paid for his accommodation. The defendant contended that the plaintiff could not bring his suit until the expiration of the last day of grace; but the court, while recognizing the doctrine that an action could not have been maintained *on the bills* until after that day, yet held that the "payment before the day was good payment at the day," and that the right of action existed at any time on the last day of grace.[1]

§ 30. Where an attachment is authorized for a debt not due, if the grounds of attachment be peculiar to that case, they cannot be resorted to for the recovery of a debt already due. If with the debt not due there be combined a claim that is due, the attachment will be good as to the former, but not as to the latter.[2] And in the case of suit on a debt not due, it is erroneous to enter judgment before the maturity of the demand.[3]

§ 31. In the cases above cited, where the damages were unliquidated, it will be observed, that the contracts for breach of which suits were brought, afforded a rule in themselves for ascertaining the damages, and upon this ground the actions were sustained. But where such is not the case, it has been considered that attachment cannot be resorted to.

§ 32. In the Circuit Court of the United States for the third circuit, a case arose, in which damages were claimed by the owner of a ship, of one who had chartered the ship, for renouncing the charter-party, and refusing to permit her to proceed on the contemplated voyage. In delivering the opinion of the court, dissolving the attachment, Justice WASHINGTON said: "Whether the plaintiffs can maintain any action upon this charter-party, by reason of the refusal of the defendant to take on board a cargo, and to prosecute a voyage, is a question which has not been considered by the court; nor is it necessary that it should be decided. For, if an action can be maintained upon it, it still remains to be

[1] Whitwell v. Brigham, 19 Pick. 117.
[2] Levy v. Millman, 7 Georgia, 167; Danforth v. Carter, 1 Iowa, 546.
[3] Ware v. Todd, 1 Alabama, 199.

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inquired, by what standard are the damages, which the plaintiffs have sustained on account of the refusal of the defendant to perform the voyage, to be ascertained? That furnished by the contract, was a certain sum per month, during the voyage, to be ascertained at its termination; but that event never took place; and consequently no rule can be deduced from this source to fit the present case. This, then, is a case in which unliquidated damages are demanded; in which the contract alleged as the cause of action, affords no rule for ascertaining them; in which the amount is not, and cannot, with propriety, be averred in the affidavit; and which is, and must be, altogether uncertain, until the jury have ascertained it; for which operation no definite rule can be presented to them."[1]

§ 33. In New Jersey, adjudications on this subject have taken place. The statute there required the plaintiff, in order to obtain an attachment, to make oath that the defendant "owes the plaintiff a certain sum of money, specifying as nearly as he can, the amount of the debt or balance." An attachment was obtained in an action of covenant, upon an affidavit that the defendant owed the plaintiff $300, "damages he had sustained by reason of the breach of covenant which the defendant made to the plaintiff and hath broken." The nature of the covenant was not disclosed by the affidavit, or otherwise; and the court held, that the attachment was not sustainable, because the cause of action sounded in damages merely, and those damages were unliquidated, and could not possibly be reduced to any degree of certainty without the intervention of a jury. But the court considered that where a covenant is for the payment of a sum certain, it might be proceeded on by attachment.[2] In the same State, it was decided that attachment would not lie for the recovery of a penalty intended to secure unliquidated damages;[3] and in Georgia, that it would not in an action for such damages, resulting from a breach of covenant.[4]

[1] Clark *v.* Wilson, 3 Wash. C. C. 560. *Sed contra*, Redwood *v.* Consequa, 2 Browne, 62.

[2] Jeffery *v.* Wooley, 5 Halsted, 123; Barber *v.* Robeson, 3 Green, 17.

[3] Cheddick *v.* Marsh, 1 Zabriskie, 463; Hoy *v.* Brown, 1 Harrison, 157; Dickerson *v.* Simms, Coxe, 199; State *v.* Beall, 3 Harris & McHenry, 347.

[4] Mills *v.* Findlay, 14 Georgia, 230. It was, however, held otherwise, under a subsequent statute, which is noticed in § 34 *a*.

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§ 34. In Alabama, under that clause of the statute above referred to, which authorized an attachment where the defendant was *indebted* to the plaintiff, the following case arose. The plaintiff alleged that the defendant contracted with him to take certain iron upon a vessel of the defendant's lying at New Orleans and bound for Providence. The iron was in three flatboats which were taken alongside the vessel, and the defendant commenced taking it on board; but he left a quantity of it in the boats and refused to take it, alleging that it would not pack well with the remainder of the freight. One of the boats, containing about forty tons of the iron, of the value of $1,000, sunk, and was totally lost. There was ample time for the defendant to have taken the iron on board his vessel, and its loss was caused by his refusal to take it according to his contract. The court, regarding the cause of action to be one for general and unliquidated damages, held it to be not within the terms of the law, and dissolved the attachment.[1]

§ 34 *a*. The cases cited in the next preceding three sections arose under statutes which contemplated *indebtedness* as the foundation of the action. But in some States the language which would limit the remedy to cases of that kind has been replaced by more comprehensive terms; and we will notice the decisions which have been made under laws of that description. In Minnesota, under a statute authorizing an attachment in an action "for the recovery of money," it was held, that it might be resorted to in any action, either *ex contractu* or *ex delicto*.[2] In Ohio, under a statute using the same terms, it was held, that an attachment might be obtained on an obligation to deliver, on and after a certain day, iron metal in payment, at a rate agreed on, for iron ore sold and delivered, and that it might be obtained before the maturity of the obligation;[3] and in the same State, that an attachment might be resorted to in an action by one partner against his copartner, after the dissolution of the firm, to recover a general balance claimed upon an unsettled partnership account.[4]

In Georgia, under a statute authorizing suits by attachment "in all cases of money demands, whether arising *ex contractu* or *ex delicto*," it was held, that an attachment could be resorted to in an

[1] Hazard *v.* Jordan, 12 Alabama, 180.
[2] Davidson *v.* Owens, 5 Minnesota, 69.
[3] Ward *v.* Howard, 12 Ohio State, 158.
[4] Goble *v.* Howard, 12 Ohio State, 165.

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action for breach of a promise of marriage.[1] The same court decided that it could not be maintained on a note, before it became due, which was payable "in notes good and solvent when this becomes due," though the statute authorized an attachment on a "money demand" before its maturity; it being considered that such a note was not a money demand until after it fell due and remained unpaid.[2]

§ 35. The right of a creditor to sue his debtor by attachment, is not impaired by his holding collateral security for the debt. The Supreme Court of Massachusetts at an early day held, that a creditor who had received personal property in pledge for the payment of a debt, could not attach other property for that debt, without first returning the pledge;[3] but this position was afterwards repeatedly overruled by that court.[4]

§ 36. If the cause of action for which the attachment is obtained, be one upon which that process might not be legally issued, the defect cannot be reached by demurrer to the declaration.[5] A motion to dissolve, or a plea in abatement, would be the proper course. And no advantage can be taken of the defect after verdict, where the defendant appears and pleads to the merits.[6]

§ 37. There can be no doubt that a corporation as well as a natural person may sue by attachment, though the statute may require the affidavit to be made by the plaintiff, without mentioning any other person by whom it may be made. The law which gives existence to the corporation, and which allows it to sue and be sued, necessarily confers on it the authority to act through its agents in any such matter.[7]

[1] Morton *v.* Pearman, 28 Georgia, 323.
[2] Monroe *v.* Bishop, 29 Georgia, 159.
[3] Cleverly *v.* Brackett, 8 Mass. 150.
[4] Cornwall *v.* Gould, 4 Pick. 444; Beckwith *v.* Sibley, 11 Ibid. 482; Whitwell *v.* Brigham, 19 Ibid. 117. In Taylor *v.* Cheever, 6 Gray, 146, the court said: "The decision in Cleverly *v.* Brackett, that a creditor to whom a debtor has pledged a chattel as security for a debt, cannot, in a suit for the debt, attach other property of the debtor without first returning the pledge, is contrary to all the authorities before and since, and is not to be regarded as law."
[5] Cain *v.* Mather, 3 Porter, 224; Jordan *v.* Hazard, 10 Alabama, 221.
[6] Redus *v.* Wofford, 4 Smedes & Marshall, 579; Marshall *v.* White, 8 Porter, 551.
[7] Trenton Banking Co. *v.* Haverstick, 6 Halsted, 171.

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CHAPTER III.

ABSENT, ABSCONDING, CONCEALED, AND NON-RESIDENT DEBTORS; AND DEBTORS REMOVING OR FRAUDULENTLY DISPOSING OF THEIR PROPERTY.

§ 38. ATTACHMENTS are generally authorized against absent, absconding, concealed, and non-resident debtors; and we will now consider the adjudications in relation to these several classes of persons. But before doing so, it may be remarked that where there are several persons liable for the same debt, the creditor may proceed by attachment against any one or more of them, in relation to whom any ground of attachment exists, without so proceeding against the others.[1]

§ 39. *Absent Debtors.* It has never been considered, so far as I have discovered, that mere temporary absence from one's place of residence, accompanied with an intention to return, is a sufficient cause for attachment. Were it so regarded, no limit could be set to the oppressive use of this process. Hence we find that usually the absence must either be so protracted as to amount to a prevention of legal remedy for the collection of debts, or be attended by circumstances indicative of a fraudulent purpose. It is often, therefore, expressly provided, that to authorize an attachment on account of absence, the absence must be of such character that the ordinary process of law cannot be served on the debtor. But even where no such qualification exists, no case is to be found justifying an attachment upon a casual and temporary absence of a debtor.[2]

§ 40. In Louisiana, an attachment was taken out against a merchant, who, during the summer, left his store in New Orleans in charge of agents, and went to New York on business, avowing his intention to return in the fall. It was contended that any

[1] Chittenden *v.* Hobbs, 9 Iowa, 417; Austin *v.* Burgett, 10 Ibid. 302; overruling Courier *v.* Cleghorn, 3 G. Greene, 523, and Ogilvie *v.* Washburn, 4 Ibid. 548.
[2] Fuller *v.* Bryan, 20 Penn. State, 144; Mandel *v.* Peet, 18 Arkansas, 236.

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kind of absence of the debtor from the jurisdictional limits of the State authorized the attachment; but this view was rejected and overruled by the court.[1]

§ 41. In New York, the court seemed to lay stress upon the fact that the debtor was out of the reach of the process of law; and held, that the remedy by attachment was available against an absent debtor, whether absent permanently or temporarily; and negatived the idea that one might go openly to another State or country, and remain there doing business, but intending to return when his convenience will permit, and by such expressed intention prevent the resort to this remedy.[2]

§ 42. It is by no means easy to determine what absence of a resident will justify an attachment. The Supreme Court of Missouri felt the difficulty, in construing a statute which authorized an attachment where the debtor "has absented himself from his usual place of abode in this State, so that the ordinary process of law cannot be served upon him." "While," said the court, "it is not admitted that every casual and temporary absence of the debtor from his place of abode, which, during the brief period of his absence, may prevent the service of a summons, is a legal ground for issuing an attachment against his property, it is difficult to define the character and prescribe the duration of the absence which shall justify the use of this process. It may be asserted, however, that where the absence is such, that if a summons issued upon the day the attachment is sued out, will be served upon the defendant in sufficient time before the return day to give the plaintiff all the rights which he can have at the return term, the defendant has not so absented himself as that the ordinary process of law cannot be served upon him."[3]

§ 43. In New York, under a statute authorizing an attachment where the defendant "has departed from the State with intent to avoid the service of a summons," a somewhat similar question arose, as to the act of departure which would sustain an attachment. Unlike the case in Missouri just referred to, the matter

[1] Watson *v.* Pierpont, 7 Martin, 413.
[2] Matter of Thompson, 1 Wendell, 43.
[3] Kingsland *v.* Worsham, 15 Missouri, 657; Ellington *v.* Moore, 17 Ibid. 424; Fitch *v.* Waite, 5 Conn. 117.

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of duration of absence was not involved, but the intent of the departure. The defendant openly and publicly went to England on business, making known to his family and his employees his intention to go, and expressing his expectation to return in six weeks. But he was on the eve of bankruptcy; and the court held, that if he left the State, though openly and publicly, and intending to transact business abroad and then return, but with a view of having the explosion of his affairs take place in his absence, and of avoiding the importunity and the proceedings of his creditors; the attachment could be sustained.[1]

§ 44. In Pennsylvania, an attachment was allowed "where the defendant had absconded, or departed from his abode, or remained out of the State, with design to defraud his creditors." A creditor obtained an attachment against his debtor on the allegation that he had departed with that design. The defendant returned before the first day of the term of court, and resisted the attachment,

[1] Morgan *v.* Avery, 7 Barbour, 656. The opinion of the court, delivered by EDMONDS, J., presents the following summary of the grounds on which the attachment was sustained. "The defendant in this case, having confessedly departed the State, all that is required is for the court to be satisfied that his departure was with intent to avoid the service of process. So that if the defendant was on the verge of bankruptcy, and left the State, though openly and publicly, and with a view of transacting business abroad, with a view of having the explosion take place in his absence, and of avoiding the importunity and the proceedings of his creditors, it would seem that the case would come within the statute. It is established that his departure was not secret, and that he went to Europe on legitimate business, avowing an intention to return in six weeks. He may not have had an intention to defraud his creditors, and therefore have left all his property behind him, except the £500 which was required for his foreign adventure. Still he may have designed to avoid the service of a summons on behalf of his creditors; and if he had such an intention, the attachment can be sustained. I am inclined to think that such intention is justly inferable from his embarrassed position; from his impaired credit; from his attempts to borrow money, so immediately on the eve of his departure; from his confessions of his inability to meet his payments as they became due; from his leaving behind him unpaid debts that were past due; from the pains he seems to have taken not to disclose to any of his creditors his intention to go abroad, though he saw some of them within a day or two of his departure, and after he had taken his passage; from the tenor of his conversations with them, which looked rather to his continuance at home than to an absence abroad; and above all from the fact that within twenty-four hours after he had sailed, his confidential clerk, whom he had left in entire charge of his affairs, called a meeting of his creditors. It may be that this latter fact, as well as the circumstance that his clerks, when interrogated as to his whereabouts, gave false or equivocal answers, or professed ignorance, may not be justly imputable to him. But I cannot overlook the fact that the clerks, though afforded the opportunity on this motion, have given no explanation of either of these matters, but leave the inference to be drawn that their behavior was in obedience to his instructions, and in furtherance of his intention to let his failure happen, and the winding up of his affairs occur, in his absence."

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urging his declaration, before he left, that the object of his journey was to collect debts, due to him in Baltimore and elsewhere; his leaving his family behind; and his subsequent return; as disproving the alleged intent. But, on the other hand, it was shown, that before his departure he had refused to be seen by his creditors; had left the city clandestinely, after night, to join the Baltimore stage the next morning; had borrowed three dollars on the road; and had ordered letters to be sent to him, directed to another name. On these facts the court considered that the departure with a design to defraud his creditors was not disproved, and the attachment was sustained.[1]

§ 45. A similar case occurred in Louisiana. An attachment was obtained on the ground that the defendant "had departed from the State, never to return." Afterwards he did return; and the question was, whether his return was conclusive evidence of his intention, when he departed, to return. The defendant showed that he had been a resident of the State for about five years, and carried on business as a merchant; that during that time he had been in the habit of absenting himself every year during the sickly season, leaving an agent or clerk to attend to his business. On the other hand, it appeared that the defendant was charged with having, with the aid of one of the tellers of a bank, — the plaintiff, — actually defrauded it of a sum of upwards of sixty thousand dollars. The court admitted that, in the absence of any suspicious circumstances, the defendant's return would probably be sufficient to establish the existence, when he left, of an intention to return; but that the consequences he had to apprehend from the fraud he was charged with having committed, rendered his intention to avoid them by flight so probable, that the mere circumstance of his return did not totally destroy the presumption.[2]

§ 46. The term "absent defendants" received a judicial construction in Kentucky, where it was held to include only such as were, at the commencement of the suit, actually absent from the State.[3] And in South Carolina, under a statute authorizing an attachment against a debtor, "being without the limits of the

[1] Gibson v. M'Laughlin, 1 Browne, 292.

[2] New Orleans Canal and Banking Co. v. Comly, 1 Robinson (La.), 231; Reeves v. Comly, 3 Ibid. 363; Simons v. Jacobs, 15 Louisiana Annual, 425.

[3] Clark v. Arnold, 9 Dana, 305.

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State," an attachment was quashed, because, when issued, the defendant was in fact within the State, though he concealed himself to avoid process, and though, by his conduct and conversation before his disappearance, he had given good reason to believe that he had left the State.[1]

§ 47. An interesting case arose in New York, which, though not very fully and definitely reported as to the particular rule deducible from it, may nevertheless be considered as laying down this doctrine, — that where a particular act, done by a debtor, will authorize an attachment, if coupled with either one of two several intents, and an attachment is obtained on an averment of the doing of the act with one of those intents, it will be sustained by proof of the other intent. The case involved a construction of that clause in the Code of Procedure authorizing an attachment where the defendant "has departed from the State with intent to defraud his creditors, or to avoid the service of a summons." Here, it will be noticed, is one *act*, coupled, disjunctively, with two several intents. The act alone would not authorize an attachment, but done with either intent, would. An attachment was obtained on an affidavit alleging a departure, with intent to defraud creditors. The defendant moved to set aside the attachment, and adduced evidence to disprove the alleged intent. The plaintiff gave evidence to sustain the allegation of the affidavit. The court held, that it was not necessary to prove the intent as averred, provided the evidence proved the other intent to have existed; and the at-

[1] Wheeler *v.* Degnan, 2 Nott & M'Cord, 323. In Kentucky, an attachment is authorized where the debtor "has been absent from the State four months." Under this provision this case arose. A. left his house in Washington county, some sixty miles from Louisville, on the 18th of December, 1859, with stock for Mississippi and Louisiana. He expected to ship the stock on board a steamer at Louisville on the 20th December, but was unexpectedly and unavoidably detained at Louisville until the 24th, when he embarked, with his stock, on a steamer bound down the Ohio River. He did not return to Kentucky until about the first of the following May. On and after the 21st of April, several attachments were sued out against him. The question was, whether the four months' absence from the State had elapsed on the 21st of April, which was more than that period after he left his house, but less than that after he embarked at Louisville. The court considered the matter at length, and announced its conclusion in these words: "Where the debtor leaves his home, with the intention of going out of the State, and does consummate his purpose, and is absent from his home, pursuant to such intention, for the period of four months, we think this should be regarded as an absence from the State, within the meaning of the code and the intention of the Legislature, notwithstanding some unlooked-for casualty may have delayed him a few days from passing beyond the territorial boundary of the State." Spalding *v.* Simms, 4 Metcalfe (Ky.), 285

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tachment was sustained, because the other intent was considered as proved. It can hardly be questioned that this is a just and sound view of the matter. The designated intents, though severally stated, are very similar in character, and it might be impracticable to state with certainty, or to prove, which intent was present in the mind of the defendant at the time of departure.[1]

§ 48. *Absconding Debtors.* An absconding debtor is one who, with intent to defeat or delay the demands of his creditors, conceals himself, or withdraws himself from his usual place of residence beyond the reach of their process;[2] and in order to constitute an absconding, it is not necessary that the party should depart from the limits of the State in which he has resided.[3] The Supreme Court of Connecticut remarked: "If a person depart from his usual residence, or remain absent therefrom, or conceal himself in his house, so that he cannot be served with process, with intent unlawfully to delay or defraud his creditors, he is an absconding debtor. But if he depart from the State, or from his usual abode, with the intention of again returning, and without any fraudulent design, he has not absconded, within the intendment of the law." Therefore, where a debtor departed from L., his usual place of residence, and went to M., in the same State, where he worked openly at his trade for above three months, without taking any measures to conceal himself; it was held, that while in this situation, he was not, with respect to a creditor in L., an absconding debtor, although his friends and neighbors in L. did not know where he was, and his absence was a subject of conversation among them.[4]

§ 49. Since concealment, or withdrawal from one's place of abode, with the intent before mentioned, is a necessary element of absconding, it cannot be said of one who resides abroad, and comes thence into a particular jurisdiction, and returns from that jurisdiction to his domicile, that, in leaving the place which he had so visited, he was an absconding debtor.[5] And under a statute au-

[1] Morgan *v.* Avery, 7 Barbour, 656.

[2] In Bennett *v.* Avant, 2 Sneed, 152, the Supreme Court of Tennessee said: "To abscond, in a legal sense, means to hide, conceal, or absent one's self clandestinely, with the intent to avoid legal process."

[3] Field *v.* Adreon, 7 Maryland, 209.

[4] Fitch *v.* Waite, 5 Conn. 117. See Oliver *v.* Wilson, 29 Georgia, 642.

[5] Matter of Fitzgerald, 2 Caines, 318; Matter of Schroeder, 6 Cowen, 603.

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thorizing an attachment against *any* person absconding or concealing himself, so that the ordinary process of law could not be served upon him, it was held, that only residents of the State who absconded were within the scope of the law, and that an attachment would not lie, for that cause, against one who had not yet acquired a residence there.[1]

In Alabama, however, it was held, that upon affidavit that the defendant "absconds or secretes himself so that the ordinary process of law cannot be served upon him," an attachment would lie, though the defendant was a resident of another State, and was only casually in the State of Alabama.[2]

§ 50. An attachment was taken out against one, on affidavit that he had departed the State with the intent of avoiding arrest, and of defrauding his creditors. Upon its being made to appear to the court that he left his home to go to another place in the same State to sell some property; that, previous to his departure, the object of his journey was communicated to his neighbors, and was generally understood; and that he publicly took his departure and returned within ten days, the attachment was superseded.[3] And so, where it satisfactorily appeared that the defendants had not absconded, although from the facts and circumstances the creditor was authorized to say that he *believed* they had done so.[4]

§ 51. The act of absconding necessarily involves *intention* to abscond. Therefore a public and open removal, or a departure unaccompanied with that intention, will not constitute an absconding. Much less will such a departure, accompanied with the expressed purpose to return, when there are no suspicious circumstances to the contrary.[5]

§ 52. In showing the true character of a departure, where it is alleged that it was but for a season, with the intention of returning, evidence of common reputation in the neighborhood to that effect is inadmissible.[6] But in all such cases, what the party said

[1] Shugart *v.* Orr, 5 Yerger, 192.
[2] Middlebrook *v.* Ames, 5 Stewart & Porter, 158.
[3] Matter of Chipman, 1 Wendell, 66.
[4] Matter of Warner, 3 Wendell, 424
[5] Boardman *v.* Bickford, 2 Aikens, 345.
[6] Pitts *v.* Burroughs, 6 Alabama, 733; Havis *v.* Taylor, 13 Ibid. 324.

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contemporaneously with his departure, or immediately previous thereto, as to the point of his destination, the object he had in view, and when he expected to return, is a part of the *res gestæ*, and may be received in evidence as explanatory of his intentions, and, in the absence of opposing proof, might repel the imputation that he was absconding, or otherwise endeavoring to evade the service of ordinary process.[1] And so his acts and declarations at the time of, or immediately anterior to, the departure, are good evidence to show the intention to abscond.[2]

§ 53. As the act of absconding is a personal act, it can be alleged only of him who has done it. "A person can neither abscond, keep concealed, or be absent by proxy." Therefore, where one member of a firm absconded, and a creditor of the firm sued all the partners in attachment as absconding debtors, and one of the defendants pleaded in abatement that he had not absconded, the plea was held sufficient to defeat the action.[3]

§ 53 *a*. The fact that a defendant, against whom an attachment has been obtained on the ground of his having absconded, afterwards appears to the action, does not constitute proof that the affidavit alleging the absconding was false. He may have been an absconding debtor when the writ was issued, and have returned afterwards.[4]

§ 54. *Debtors concealing themselves.* The concealment which will justify an attachment is but a phase of absconding, though sometimes in attachment laws the two acts are set forth separately, and independent of each other, so as to indicate that they are regarded as distinct. More usually, however, they are connected together thus, — "absconds or conceals," or "absconds or secretes"; in which case they have been regarded, and no doubt rightly, as undistinguishable. It has, therefore, been held, that an affidavit stating that the defendant "absconds or conceals himself," does not exhibit two separate grounds for attachment, which, coupled

[1] Pitts *v.* Burroughs, 6 Alabama, 733; Offutt *v.* Edwards, 9 Robinson (La.), 90; Havis *v.* Taylor, 13 Alabama, 324; Burgess *v.* Clark, 3 Indiana, 250; Oliver *v.* Wilson, 29 Georgia, 642.

[2] Ross *v.* Clark, 32 Missouri, 296.

[3] Leach *v.* Cook, 10 Vermont, 239.

[4] Phillips *v.* Orr, 11 Iowa, 283.

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by the disjunctive "or," would be vicious, but one only; for the terms are of equivalent meaning.[1]

§ 54 *a*. An attachment was obtained on an affidavit that the defendant "so conceals himself that process cannot be served upon him." The facts were, that the defendant was called upon in the evening for payment of the demand, and notified that unless he made payment, suit would be instituted. During the night, or the next morning, he sold out his entire stock of goods, without taking an invoice, and in the morning left, and was absent for two months. When called upon, the evening before, he had promised to call and see plaintiff's attorney in the morning, but left without doing so, or giving any notice that he designed to leave. Upon these facts it was held, that an instruction to the jury in the following terms was correct: "It is concealment to avoid service of process, no matter whether for an hour, a day, or a week; whether with a view to defraud creditors, or merely to have time to make a disposition, lawful or otherwise, of his property, before his creditors got at him; it is placing himself designedly so that his creditors cannot reach him with process, which constitutes concealment under the statute."[2]

§ 55. Where an attachment was issued, on affidavit that "the defendant was secreting himself, so that the ordinary process of law could not be served," and it was shown on his behalf, that he was temporarily absent from his place of abode, on a visit to his son-in-law in another county of the same State; that the plaintiff knew the defendant's intention to make said visit long before he started, and that his intention was also publicly and notoriously known; it was held, to be unnecessary for the defendant to show that he communicated to the plaintiff his intention to make the visit; and that it was sufficient if it were known in the neighborhood, and could have been ascertained on inquiry.[3]

§ 56. Concealment, to authorize an attachment, must be with the intent to defeat or delay the claims of creditors, by avoiding the service of process. Therefore, one who conceals himself for

[1] Goss *v.* Gowing, 5 Richardson, 477; Conrad *v.* M'Gee, 9 Yerger, 428.
[2] Young *v.* Nelson, 25 Illinois, 565.
[3] Walcott *v.* Hendrick, 6 Texas, 406. See Boggs *v.* Bindskoff, 23 Illinois, 66.

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the purpose of avoiding a criminal prosecution is not within the purview of the law.[1]

§ 57. *Non-resident Debtors.* It may be remarked that mere absence from a particular jurisdiction is not a convertible term with non-residence. As we shall presently see, absence from one's domicile may be prolonged to such an extent as to justify his being subjected to attachment as a non-resident; but where a statute authorizes an attachment against a debtor on the ground of non-residence, he cannot be proceeded against on an affidavit alleging that he absconds and is not within the State.[2]

§ 58. In determining whether a debtor is a resident of a particular State, the question as to his domicile is not necessarily always involved; for he may have a residence which is not in law his domicile. Domicile includes residence, with an intention to remain; while no length of residence, without the intention of remaining, constitutes domicile.[3]

§ 59. A *resident* and an *inhabitant* mean the same thing. A person resident is defined to be one "dwelling or having his abode in any place"; an inhabitant, "one that resides in a place."[4] These terms will therefore be used synonymously, as they may occur in the cases cited.

§ 59 *a*. In the attachment law of at least one State, — Maryland, — the word *citizen* is used in reference to persons liable to be proceeded against by attachment, and the meaning of that word, in that connection, became the subject of discussion there; and the court held, that a party may not be a citizen for political purposes, and yet be one for commercial or business purposes; and considered that one who was residing and doing business in that State was, in contemplation of the attachment laws, a citizen of that State, though an unnaturalized foreigner, and entitled to no political privileges. This was, in effect, to make no distinction in meaning between the words *citizen*, *resident*, and *inhabitant*.[5]

[1] Evans *v.* Saul, 8 Martin, N. S. 247. [2] Croxall *v.* Hutchings, 7 Halsted, 84.
[3] Matter of Thompson, 1 Wendell, 43; Foster *v.* Hall, 4 Humphreys, 346.
[4] Roosevelt *v.* Kellogg, 20 Johns. 208; Matter of Wrigley, 4 Wendell, 602; S. C. 8 Wendell, 134; 2 Kent's Com. 431, note; Wiltse *v.* Stearns, 13 Iowa, 282.
[5] Field *v.* Adreon, 7 Maryland, 209; Riserwick *v.* Davis, 19 Ibid. 82.

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§ 60. Where the subject of a foreign government, who had been trading in the West Indies, came to this country on a commercial adventure, without any idea of settling here, or of not returning hence as soon as his business was settled, he was held to be a non-resident, and liable as such to an attachment.[1] So, a person coming occasionally to a place in the course of trade, cannot be called an inhabitant of that place.[2] Nor can one who removed from another State clandestinely, and conceals himself in that to which he fled, be regarded as a resident of the latter.[3] So, where one who had been a resident of New York, broke up his residence and sailed for England *sine animo revertendi*, but after staying there three weeks returned to New York, on his way to Canada, and took lodgings in Brooklyn to await the arrival of his goods, and remained there a few weeks, and then passed over to New York, and took lodgings there for a few days; it was held, that these circumstances afforded no foundation for a pretence that he was a resident or inhabitant of New York.[4]

§ 61. But one who goes to a place with the intention to reside there, becomes a resident of that place, and acquires a domicile there, whether the residence have been long or short.[5] But this *animus manendi* must certainly exist, otherwise no domicile is acquired. Therefore, where one had abandoned his residence in Indiana, and went thence with his family to New York, where he lived with a friend, while he was looking out for an opportunity of again getting into business; and whether he should finally settle in that State, or elsewhere, was undetermined; it was considered that he might be proceeded against by attachment, as a non-resident of New York.[6] But where an attachment was taken out against a party on the ground of non-residence, the affidavit alleging he had but just emigrated to this country, and had no permanent residence, except his staying as a boarder and lodger with the plaintiff; it was held, that he was not a non-resident, having left forever his native land, and having no determination to reside

[1] Matter of Fitzgerald, 2 Caines, 318.
[2] Barnett's Case, 1 Dallas, 152; Boardman *v.* Bickford, 2 Aikens, 345.
[3] Shugart *v.* Orr, 5 Yerger, 192.
[4] Matter of Wrigley, 8 Wendell, 134; Remarks of Chancellor Walworth, s. c. 4 Wendell, 602.
[5] 2 Kent's Com. 431, note.
[6] Burrows *v.* Miller, 4 Howard Pract. R. 349.

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elsewhere than where he was at the time of the attachment being obtained.[1]

§ 62. On the question of residence, the mode of living is not material, whether on rent, at lodgings, or in the house of a friend. The apparent or avowed intention of *constant* residence, not the manner of it, constitutes the domicile. In inquiries of this sort minute circumstances are taken into consideration: the immediate employment of the party, his general pursuits and habits of life, his friends and connections, are circumstances which, thrown into the scale, may give it a decisive preponderance.[2] Therefore, where a man came from another place to reside in Pennsylvania, introduced his family there, took a house, engaged in trade, and contracted debts, he was held to be an inhabitant, so as to be the subject of domestic, and not of foreign, attachment.[3] So, where an unmarried man came to Philadelphia, took lodgings, and rented a store in the city, where he carried on trade, and frequently declared his intention of taking up a permanent residence in the city, he was held to be an inhabitant.[4] And while a man thus remains, he is to be regarded as a resident of the place, though he avow an intention to withdraw from it;[5] and though he go away, stating that he intends to go to another State, but is absent only a short time, and does not leave the State in which he has resided.[6] And so, though he go into another State to seek another residence. In such case he does not become a non-resident until the fact and intention unite in another abode elsewhere.[7]

§ 63. It follows from these views of what constitutes a resident or inhabitant, that change of abode, *sine animo revertendi*, makes one immediately a non-resident of the place from which he departs.[8] Therefore, where a person resided and carried on business in New York for several years, and becoming embarrassed and unable to pay his debts, determined to leave this country for Eng-

[1] Heidenbach *v.* Schland, 10 Howard Pract. R. 477.
[2] Guier *v.* O'Daniel, 1 Binney, 349, note.
[3] Barnet's Case, 1 Dallas, 152; Thurneyssen *v.* Vouthier, 1 Miles, 422.
[4] Kennedy *v.* Baillie, 3 Yeates, 55.
[5] Lyle *v.* Foreman, 1 Dallas, 480; Bainbridge *v.* Alderson, 2 Browne, 51; Smith *v.* Story, 1 Humphreys, 420; Stratton *v.* Brigham, 2 Sneed, 420.
[6] Shipman *v.* Woodbury, 2 Miles, 67; Wheeler *v.* Degnan, 2 Nott & McCord, 323.
[7] Pfoutz *v.* Comford, 36 Penn. State, 420.
[8] Moore *v.* Holt, 10 Grattan, 284.

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land, and did actually leave, taking with him his effects, without any intention of returning, he was held to be no longer an inhabitant of New York.[1] So, where one had acquired a residence in Philadelphia, and sailed thence to the West Indies as supercargo of a vessel, taking with him four fifths of his property, having previously executed an assignment of the rest of it for the benefit of creditors; and engaged in trade in the West Indies, where he was seen by persons who understood from him that he did not intend to return soon, and his letters had been for nine months silent as to his return; he was considered to be no longer an inhabitant of the State, and his property was subjected to a foreign attachment, though when he went away he expressed his purpose to return in twelve or eighteen months.[2] So, where one resided a few months in Philadelphia, and then proceeded to Virginia, whence he sailed for England, in consequence of receiving intelligence of the misconduct of a partner there, but declaring his intention to return in the ensuing spring; it was considered that he had ceased to be an inhabitant of Pennsylvania, and was subject to foreign attachment.[3] So, where a resident of Kentucky stated that he had purchased land in Missouri, and intended to go there in the fall to live; and persuaded an acquaintance to go with him and settle in his neighborhood; and did go away in the fall, and was absent when the suit was brought; it was held sufficient to justify proceeding against him by attachment as a non-resident, though he returned a month after the suit was brought.[4] So, where one left Indiana under false pretexts, leaving his family ignorant of the cause of his flight, and the place of his destination; and was absent for more than two months, when a suit by attachment was brought against him as a non-resident, and was gone about a year altogether, and during that time was in Nevada Territory, and there was nothing showing an intention to return, but circumstances authorizing the contrary inference; it was held, that it might be inferred that he had left Indiana, and located in Nevada, with the intention of making his home in that Territory.[5]

§ 63 *a*. As a change of abode, *sine animo revertendi*, is necessary to make one a non-resident of the place from which he departs, it

[1] Matter of Wrigley, 4 Wendell, 602; s. c. 8 Wendell, 134.
[2] Nailor *v.* French, 4 Yeates, 241.
[3] Taylor *v.* Knox, 1 Dallas, 158.
[4] Farrow *v.* Barker, 3 B. Monroe, 217.
[5] McCollem *v.* White, 23 Indiana, 43.

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follows that the enlistment of one in the volunteer military service of the United States, or his being drafted into it, and his departure from the place of his domicile to a point out of the State, in the performance of military duty, with an intention to return at the expiration of his term of service to his former abode, cannot have the effect of making him a non-resident.[1]

§ 64. When an individual departs from his place of abode in one State, with the intention of taking up his residence in another State, at what point of time is he to be regarded as a non-resident of the State in which he has been domiciled? Can he be so considered before he passes the boundary of that State? This question arose in Virginia, under a statute authorizing an attachment "against a person who is not a resident of this State." The defendant left Winchester at nine o'clock, A. M., and went by railroad to Harper's Ferry, where he remained until between half past two and three o'clock, P. M., when he took the cars for Baltimore, intending to go directly on to Philadelphia, where he purposed residing. Between ten and eleven o'clock, A. M., of that day, an attachment was taken out and immediately executed. The point was raised whether, at that time, the defendant, being still within the limits of the State, had become a non-resident; and the Court of Appeals held that he had.[2] But in New Jersey the contrary was held. There the defendant had moved his goods and chattels out of the house he had been occupying to a canal-boat, with the intention of taking them and his family to another State; and while some of the goods were on the boat, some on the wharf, ready to be put on board, and others on the premises, and *in transitu* from the premises to the boat, an attachment was taken out on the ground that he was "not resident in this State at this time." The court held, that at most there was but an *intention to remove*, which, without the fact of an actual removal, did not make the defendant a non-resident.[3]

§ 65. The Court of Appeals of New York recognized the compatibility of domicile in that State with actual non-residence, so as to authorize the party to be proceeded against by attachment as a

[1] Tibbitts *v.* Townsend, 15 Abbott Pract. R. 221.
[2] Clark *v.* Ward, 12 Grattan, 440. See Spalding *v.* Simms, 4 Metcalfe (Ky.), 285.
[3] Kugler *v.* Shreve, 4 Dutcher, 129.

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non-resident, even when the intention to return existed, and there was no abandonment of domicile. This was only an extended application of the doctrine held in that State, in the case above cited,[1] as applied to *absent* debtors. In the case now referred to, the defendant was proceeded against as a *non-resident*. On his behalf it was offered to be proved, that he was not a non-resident of New York when the attachment was taken out, but a resident thereof; and that he had been absent about three years, attending to a lawsuit at New Orleans, and returned thence to New York after the attachment was obtained. This evidence was excluded by the judge, because the offer itself showed the defendant to be a non-resident at the time the attachment issued; and the Court of Appeals sustained this ruling, and held that the defendant was a non-resident when the attachment issued, although domiciled in New York.[2] The doctrine of this case was, substantially, adopted in Maryland.[3]

§ 65 *a*. The legal residence of a wife follows that of her husband, though she may not actually reside at the place of his domicile; and hence she may, conjointly with her husband, be proceeded against by attachment, as a non-resident of the State in which she actually resides, if he be a resident of another State. This was held in a case where the wife was, before marriage, a resident of New Jersey, and was married there to a resident of New York. After the marriage they went abroad to Europe, and during their absence an attachment was sued out against them as non-residents, for a debt contracted by the wife *dum sola*. It was her intention, when she went abroad, to return to her place of residence in New Jersey and continue her residence there for a time, and on her return she carried out that intention; her husband visiting her on Saturdays, coming, for that purpose, from New York, where he did business, and returning the next week to New York. She was held to be a non-resident of New Jersey, so as to authorize the attachment.[4]

§ 66. In connection with the non-residence of one member of a

[1] Matter of Thompson, 1 Wendell, 45.

[2] Haggart *v.* Morgan, 1 Selden, 422; Frost *v.* Brisbin, 19 Wendell, 11. *Sed contra*, Brundred *v.* Del Hoyo, Spencer, 328. See remarks of ROOSEVELT, J., in Hurlbut *v.* Seeley, 11 Howard Pract. R. 507.

[3] Risewick *v.* Davis, 19 Maryland, 82.

[4] Hackettstown Bank *v.* Mitchell, 4 Dutcher, 516.

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firm, the question arises, whether, on a firm debt, an attachment against him may be levied on the partnership effects. This depends upon whether, in the State in which the firm exists, a joint liability is declared by statute to be joint and several. If so, the non-resident partner may be sued by attachment, and the attachment may be levied on partnership effects;[1] but if the rule of the common law, that partners must be sued jointly, be unaltered, it cannot.[2]

§ 67. The remedy by attachment against a non-resident is not annulled or suspended by his accidental or transient presence within the State;[3] nor by the fact that he has a commercial domicile — that is, is engaged in business — therein, when his personal domicile is in another State.[4] Therefore where a defendant had all his business and property in the State of New York, and all his business capital and his bank account in the city of New York, where he was engaged in business, and where he spent on an average eight hours of every business day; but for reasons of convenience and economy, maintained his family in Jersey City, in the State of New Jersey, and spent with them there his nights and Sundays; it was held, that he was not a resident of the State of New York.[5]

§ 68. In many of the States statutory provisions exist, authorizing attachments to issue, where a debtor is about to remove his property out of the State, or to dispose of it so as to defraud his creditors. We will give attention to the cases which have arisen under provisions of this description.

§ 69. *Debtors removing their Property.* In Louisiana, under a statute authorizing an attachment where "the debtor is about to remove his property out of the State before the debt becomes due," it was decided that the statute must be understood to apply to property which the creditor might have supposed would not be

[1] Greene *v.* Pyne, 1 Alabama, 235; Conklin *v.* Harris, 5 Ibid. 213.
[2] Wiley *v.* Sledge, 8 Georgia, 532.
[3] Bryan *v.* Dunseth, 1 Martin, N. S. 412; Jackson *v.* Perry, 13 B. Monroe, 231.
[4] Rayne *v.* Taylor, 10 Louisiana Annual, 726.
[5] Barry *v.* Bockover, 6 Abbott Pract. R. 374; Potter *v.* Kitchen, Ibid. 374, note; Lee *v.* Stanley, 9 Howard Pract. R. 272; Houghton *v.* Ault, 16 Ibid. 77; Chaine *v.* Wilson, Ibid. 552.

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carried out of the State, and to which he might have looked for his security at the time of contracting, or since; but that it would be unreasonable to extend it to a species of property which, from its nature and destination, must necessarily be taken out of the State, and which the creditor could not have believed would remain continually within its limits. Therefore, where a debtor was the owner of a steamboat, which he had purchased from the plaintiff, and for part of the purchase-money had given notes to the plaintiff, secured by a mortgage on the boat, which notes were not yet due; and after the giving of the notes, he had been running the boat regularly in a particular trade, which necessarily took her out of the State; it was considered, that the fact of the defendant being about to take her away on one of her regular trips, without any fraud, or intention to defraud, being alleged, was not sufficient to justify an attachment, on the statutory ground above cited.[1]

§ 70. In Illinois, where the statute authorized an attachment when the debtor "is about to remove his property from this State to the injury of such creditor," an attachment was obtained on that ground against two debtors, and levied on a quantity of pig iron, which was all the personal property owned by the defendants in the county, at the time the writ issued. The defendants filed a plea in abatement, traversing the allegation of the affidavit. On the trial of this plea, they offered to prove that one of them owned a large amount of personal property in the State, free from any incumbrance, and more than sufficient to discharge the plaintiff's demand. The court excluded this evidence; but the Supreme Court held this exclusion to be erroneous. They considered that, not only must there be a removal of the property of the defendants, but it must be to the injury of the plaintiff; and that the proof offered was competent, as tending to show that the removal would not operate to the plaintiff's injury.[2]

§ 70 *a*. In Mississippi, an attachment was obtained on the ground that the defendant was "about to remove his property out of this State." The defendant plead in abatement, denying the allegation of the affidavit. On the trial under this plea, it

[1] Russell *v.* Wilson, 18 Louisiana, 367.
[2] White *v.* Wilson, 10 Illinois (5 Gilman), 21; Ridgway *v.* Smith, 17 Ibid. 33.

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appeared that the defendant, in pursuance of a previously expressed purpose, had removed a part of his property to Louisiana, but that at the time of the attachment he had, in Mississippi, real and personal property, more than sufficient to pay all his liabilities in that State, which he did not remove, or intend to remove. The court held, that in such case an attachment would not lie; and the grounds of its decision were thus stated: "The object of the statute is to afford to the creditor a security for his debt, in case the debtor is about to remove his property out of this State, so as to deprive the creditor of the collection of his debt in this State. The principle upon which the statute proceeds, is *the danger of loss of the debt by the removal of the defendant's property;* and this reason fails, and the remedy provided by the statute plainly does not apply, where the debtor is removing a part of his property, but does not remove, or intend to remove, another part of it, subject to the payment of the debt, amply sufficient to satisfy it, and accessible to the creditor's execution, and such portion of his property remains in his possession openly subject to execution. For, when property to such an amount, and so situated, remains in the possession of the debtor, and is not about to be removed from the State, it could not be justly said that the creditor's debt would be in danger of being lost, by the removal of another part of the debtor's property from the State."[1]

§ 71. In Tennessee, under a law allowing an attachment where a debtor "is removing, or about to remove himself or his property beyond the limits of this State," an attachment was obtained against the owner of a steamboat, on the allegation that he was "about to remove the said steamboat beyond the limits of this State." The court intimated that the designation of only a particular piece of property, as about to be removed, if it stood alone, would not be sufficient to authorize the attachment; and that the affidavit ought to use the words of the statute, or should exclude the idea that other property might still be left by the defendant, within the jurisdiction, amply sufficient to satisfy the demand; but considering the allegation that the defendant was about to remove his boat equivalent to the assertion that he was about to remove himself, the attachment was sustained.[2]

[1] Montague v. Gaddis, 37 Mississippi, 453. [2] Runyan v. Morgan, 7 Humphreys, 210.

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§ 71 *a*. *Debtors fraudulently disposing of their property.* In many States an attachment is authorized upon affidavit that the defendant has made, or is about to make, some fraudulent disposition of his property. The particular terms of the different statutes on this subject are set forth in the Appendix, and will not be referred to here, except in connection with the reported cases. But there is one phrase, — "his property," — which is common to them all, and the scope of which should be determined. This was done by the Supreme Court of New York, in a case where the ground of the attachment was, that the defendant had stolen, secreted, or embezzled money of the plaintiff to the amount of $5,000 and upwards; that he said he had deposited part of the proceeds in the name of a little sister, and acknowledged that he did this to avert suspicion, and to prevent the property being taken from him, and to conceal it. It was contended that an attachment did not lie, because the property which he so concealed was not his; but the court sustained the attachment, and said: "The Code speaks of the secreting of the *defendant's* property. By that was meant any property in his possession, and to which he claimed title, although his title was imperfect or clearly bad. The injury to the creditor, and the intent to defraud, are as clearly shown in that case, as if the defendant had a perfect title to the property."[1]

§ 72. In Missouri, an attachment was issued, upon affidavit that the defendant had fraudulently conveyed, assigned, concealed, and disposed of his property and effects, so as to hinder, delay, and defraud his creditors. The defendant pleaded in abatement, traversing the allegations of the affidavit. On the trial it appeared that, just before the attachment issued, the defendant had sold his entire stock of goods to a person to whom he was indebted, for the purpose of paying his debt; and it was held, that such a sale was not to be considered fraudulent, although the defendant, about the time it was effected, made false representations as to his condition and intentions, unless the vendees were parties to the fraud.[2]

§ 73. In the same State this case arose. An attachment was

[1] Treadwell *v.* Lawlor, 15 Howard Pract. R. 8.
[2] Chouteau *v.* Sherman, 11 Missouri, 385.

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sued out, on the ground that the defendant "had fraudulently conveyed, assigned, removed, concealed, and disposed of his property and effects, so as to hinder, defraud, and delay his creditors, and that he was about to do those things." A plea in abatement was filed putting in issue the truth of the affidavit. On the trial it appeared that the defendant, being indebted to the plaintiff and others, was permitted by them to take a certain amount of goods, under a written agreement to make a weekly account of his sales, and pay over the proceeds, after deducting certain charges; and that he made on one occasion a considerable sale of goods for cash, of which he made no return. The court instructed the jury that "the concealment contemplated by the statute, means secreting goods, and not concealment of circumstances, or misrepresentation of facts, and that this last-mentioned conduct is no ground for issuing an attachment." This was held by the Supreme Court to be erroneous. "That instruction," said the court, "declares that the concealment referred to in the statute must be a concealment of goods, and not of facts and circumstances. This distinction we confess ourselves unable to appreciate. If the defendant had packed away in his cellar goods to the value of one thousand dollars, with a view to defraud his creditors and prevent them from collecting their debts, this is conceded to be a fraud within the meaning of the statute; but if he sells the same goods, and puts the money in his pocket, with the same intent of cheating his creditors by the operation, it is regarded as a mere concealment of circumstances we suppose, and therefore not such a concealment as is reached by the attachment law. The statute uses the phrase 'goods and effects.' The money for which the goods were sold by the defendant was as capable of being concealed as the goods were, and the concealment of the money is surely not less a fraud, because it was accompanied with a concealment and misrepresentation of facts and circumstances."[1]

§ 74. An attachment was obtained in Missouri, on the ground that the defendant had fraudulently conveyed his property, and was about to conceal or dispose of his property so as to hinder and delay his creditors. The defendant denied these allegations. On the trial, it was shown that he had, previous to the issue of

[1] Powell *v.* Matthews, 10 Missouri, 49.

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the attachment, confessed a judgment in favor of another party, upon which execution was issued, and when the sheriff went to defendant's store to levy the same, he found there the execution plaintiff, who, after some conversation with the defendant, instructed the sheriff to suspend a levy until further orders; and that nothing was done under the execution, until the attachment was placed in the hands of the sheriff, when the execution plaintiff directed a levy. This was held by the court to be a fraudulent disposition of his property by the defendant; and it was further held, that the declarations of the execution plaintiff in connection with the transaction might be given in evidence against the defendant.[1]

In the same State an attachment was obtained, on the ground that the defendant "had fraudulently conveyed or assigned his property or effects so as to hinder or delay his creditors." The evidence showed a conveyance by the defendant of a stock of goods to C. to secure and pay debts to R., which conveyance the plaintiff endeavored to show was made fraudulently, so as to hinder and delay his creditors. It was held unnecessary, in order to sustain the attachment, to show that the trustee and the *cestui que trust* acted in bad faith; but that if the defendant acted with a fraudulent intent in making the deed, it was sufficient; and that his statements, made shortly after the execution of the deed, might properly be given in evidence to show the intent with which he made it.[2] And in a subsequent case it was decided, that in making such a conveyance the fraudulent intent must be shown to have existed, in order to sustain the attachment, and that it was not sufficient merely to show that the effect of the conveyance was to hinder and delay creditors.[3]

In the same State, where an attachment was obtained on the ground that the defendant was about fraudulently to conceal, remove, or dispose of his property or effects so as to hinder or delay his creditors, it was held not necessary to show that he was about so to dispose of *all* his property, but that the attachment would be sustained, if he was about so to dispose of any part of it.[4]

§ 75. In New York, under a statute which allowed an attachment to issue, "when it shall satisfactorily appear to the justice

[1] Field *v.* Livermore, 17 Missouri, 218.
[2] Enders *v.* Richards, 33 Missouri, 598.
[3] Spencer *v.* Deagle, 34 Missouri, 455.
[4] Taylor *v.* Myers, 34 Missouri, 81.

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that the defendant is about to remove from the county any of his property, with the intent to defraud his creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete any of his property with the like intent," an attachment was issued, upon affidavits specifying several causes, among which was, that the defendant was about to dispose of his property with intent to defraud his creditors. The affidavit assigned the existence of the following facts as evidence of that intent: that the defendant left the county of Chemung two months before, and went to the province of Upper Canada, with intent to remain there, and had taken with him some portion of his personal property; that he had no family, and but little property; that he was offering his property in Chemung county for sale; that he told the plaintiff that he would be damned glad if he ever got his pay of him; that no civil process could be served on him, because he kept out of the State; and that he refused to pay anything on the plaintiff's debt. It was held, that these facts proved a strong case of *intent* to dispose of property to defraud creditors.[1]

§ 75 *a*. In New York an attachment was obtained, on the ground that the defendant was "about to assign or dispose of his property, with intent to defraud his creditors." In support of the attachment, evidence was given of threats of the defendant to make an assignment of his property, and that plaintiff would get nothing, and to put his property out of his hands sooner than pay more than one third of his debts; and on the plaintiff's refusing to take less than the amount of his claim, the defendant threatened to go home and put his property out of his hands. In the Supreme Court, at Special Term, INGRAHAM, J. held this evidence to warrant the presumption of a fraudulent intent;[2] but at General Term this decision was reversed, on the ground that the threat of the defendant to make an assignment of his property, was a threat to do a lawful act; and that the attachment could not be sustained without presuming an evil intent, which is contrary to the principle that we are not to presume wrong until wrong is plainly indicated; and that the conduct of the defendant in subsequently making a legal and valid assignment of his property, was a fact to be considered as indicating the intent of the

[1] Rosenfield *v.* Howard, 15 Barbour, 546.
[2] Wilson *v.* Britton, 6 Abbott Pract. R. 33.

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previous threat.[1] But in a subsequent similar case, where it appeared that the defendant's assets were more than sufficient to pay all the other claims against him than that sued on, *and that he only wanted time to pay all his debts*, it was held, that the threatened assignment must have been intended to be fraudulent, or an instrument of fraud; and the attachment was sustained.[2] And where a debtor refused to pay his note on demand, and was told by the creditor that he would be sued; and he thereupon threatened, if he was sued, "to turn over all his property, and that the creditor would n't get a cent"; it was held, that this threat evidenced an intention to dispose of his property so as to baffle the creditor in the speedy collection of his debt, and the attachment was sustained.[3] It will be observed that this case differs from those just referred to in this connection, in that the threat was not to put his property out of his hands by making an assignment. This difference was recognized by the court, which said that cases in which the only threat was to make merely a lawful assignment, were inapplicable to this case.

§ 76. Where an attachment in chancery was obtained, upon the complainant alleging his belief that the defendant would sell, convey, or otherwise dispose of his property, with the intent to hinder, delay, and defraud the complainant, unless prevented by attachment; it was held, that the fraudulent intent must be shown to have existed before the suing out of the attachment; and that to prove it to have originated afterwards was not sufficient.[4]

§ 77. In Iowa, under an affidavit that "the defendant *is* in some manner about to dispose of, or remove his property with intent to defraud his creditors," evidence of acts done by him ten years before, in another State, was held not admissible or relevant to prove the truth of the affidavit. "However competent such evidence might be," said the court, "if the plaintiff had first given testimony of any fact or facts, which would tend directly to establish, on his part, the issue joined, in order to strengthen the evidence, certainly, until some ground in fact, upon the issue thus

[1] Wilson *v.* Britton, 6 Abbott Pract. R. 97; Dickinson *v.* Benham, 10 Ibid. 390; s. c. 12 Ibid. 158; 19 Howard Pract. R. 410.
[2] Gasherie *v.* Apple, 14 Abbott Pract. R. 64.
[3] Livermore *v.* Rhodes, 27 Howard Pract. R. 506.
[4] Warner *v.* Everett, 7 B. Monroe. 262.

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joined, had been laid for its operation, it was inadmissible, being irrelevant. To allow such facts to be resuscitated after the lapse of ten or twelve years, and made the gravamen of a legal proceeding such as this, would be pushing the severity of the attachment law to an extreme never contemplated by the legislature."[1]

[1] Lewis v. Kennedy, 3 G. Greene, 57.

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CHAPTER IV.

LIABILITY OF CORPORATIONS AND REPRESENTATIVE PERSONS TO BE SUED BY ATTACHMENT.

§ 78. WE have seen that *debtors* are liable to be sued by attachment. This might be supposed to include all descriptions of persons; but we find that doubts have arisen as to the liability of corporations to attachment; and that there are some descriptions of natural persons who are exempt from it. We will briefly consider these subjects.

§ 79. *Corporations.* At an early day the Supreme Court of New York decided that, under the law of that State, an attachment did not lie against a foreign corporation. This view, however, has not been followed by any court out of that State; but the contrary doctrine has been announced in New Hampshire, Pennsylvania, Virginia, Georgia, Alabama, Louisiana, Tennessee, Illinois, and Missouri, and may now be considered as settled.[1] In

[1] McQueen *v.* Middletown Man. Co., 16 Johns. 5; Libbey *v.* Hodgdon, 9 New Hamp. 394; Bushel *v.* Commonwealth Ins. Co., 15 Sergeant & Rawle, 173; U. S. Bank *v.* Merchants' Bank, 1 Robinson (Va.), 573; South Carolina R. R. Co. *v.* McDonald, 5 Georgia, 531; Planters & Merchants' Bank *v.* Andrews, 8 Porter, 404; Martin *v.* Branch Bank, 14 Louisiana, 415; Hazard *v.* Agricultural Bank, 11 Robinson (La.), 326; Union Bank *v.* U. S. Bank, 4 Humphreys, 369; Mineral Point R. R. Co. *v.* Keep, 22 Illinois, 9; St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Missouri, 421. On this subject the opposite views entertained will be seen by the following extracts from the opinions of the courts of New York, Pennsylvania, and Georgia.

The grounds of the New York decision are thus stated by SPENCER, J.: "An attachment having been issued in this case against the estate of a corporation existing in Middletown, in the State of Connecticut, a motion is now made for a *supersedeas*, on the ground that the statute for relief against absent and absconding debtors does not authorize a proceeding against a corporation. The attachment, it has been contended, may issue in such a case under the 23d section of the act. That section enacts that the real and personal estate of every debtor who resides out of this State, and is indebted within it, shall be liable to be attached and sold for the payment of his debts, in like manner, in all respects, as nearly as may be, as the estates of debtors residing within this State; and proof is required by two witnesses, of the residence of such debtor out of the State. It cannot be doubted that this section must be construed in connection with the other sections of the act, and particularly with reference to the first and twenty-first sections. The first section regulates the amount of the debt for which an attachment may issue, and the twenty-first section provides, that if the debtor shall, before the appointment of trustees, apply to the judge who issued the attachment, and

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several of the States corporations are expressly subjected by statute to the operation of the process.

give such security as he shall approve, to the creditor at whose instance the warrant issued, to appear and plead to any action to be brought, in any court of law or equity in this State, within six months thereafter, against him by such creditor, and to pay such sum as may be recovered in such action, in that case such judge shall issue a *supersedeas* to the warrant. It is very certain, that no attachment can be issued under this act, against domestic corporations, for they cannot conceal themselves, nor abscond. The court have no doubt, from a view of the whole act, that the legislature intended to authorize proceedings under it against natural persons only. The twenty-first section supposes, that the person giving the security to appear and plead to any action to be brought would, if within the State, be subject to a suit; and we think a foreign corporation never could be sued here. The process against a corporation must be served on its head, or principal officer, within the jurisdiction of the sovereignty where this artificial body exists. If the president of a bank of another State were to come within this State, he would not represent the corporation here; his functions and his character would not accompany him, when he moved beyond the jurisdiction of the government under whose laws he derived his character; and though, possibly, it would be competent for a foreign corporation to constitute an attorney to appear and plead to an action instituted under another jurisdiction, we are clearly of the opinion that the legislature contemplated the case of a liability to arrest, but for the circumstance, that the debtor was without the jurisdiction of the process of the courts of this State; and that the act in all its provisions meant, that attachments should go against natural, not artificial, or mere legal entities. The first section speaks of persons, and throughout the act natural persons only were intended to be subjected to its provisions."

In Pennsylvania the contrary view was taken, in an elaborate opinion pronounced by ROGERS, J., on a motion to dissolve an attachment because the defendant was a foreign corporation. "In order to sustain the motion," said the judge, "it will be necessary for the defendants to show that they are not embraced by the words and spirit of the act. It is difficult to conceive that if corporations are artificial persons, — if they can do all acts that natural persons may, — if they can sue within a foreign jurisdiction, why they should not also be liable to suit, in the same manner, and under the same regulations as domestic corporations. The reason why they have not been, in point of fact, more frequently sued, is given by Chief Justice SPENCER, in 16 Johns. 5.

"'The process against a corporation, by the common law, must be served on its head or principal officer, within the jurisdiction of the sovereignty where this artificial body exists. If the president of a bank of another State were to come within this State, he would not represent the corporation here: his functions and his character would not accompany him, when he moved beyond the jurisdiction of the government under whose laws he derived his character.' That this would be the case, when he was within the State on business unconnected with the corporation, there can be no question; but where a corporation locates the president, or other officer, within the State, for the express purpose of making contracts here, whether process served on him would not be sufficient, is a question which I shall not undertake to determine, because it does not necessarily arise. There is nothing, then, in the nature of a corporation to exempt it from suit. The difficulty arises from there being no person within the limits of the State on whom you can serve your process.

"With the multiplication of corporations, which has and is taking place to an almost indefinite extent, there has been a corresponding change in the law in relation to them. There was a time when it was supposed that no suit could be sustained against them, unless upon an express contract, under the seal of the corporation. It is now held, that they are liable in trespass, and in case, upon an implied contract. This change in the law has arisen from a change of circumstances; from that silent legisla-

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§ 80. The foreign character of a corporation is not to be determined by the place where its business is transacted, or where the

tion by the people themselves, which is continually going on in a country such as ours, — the more wholesome, because it is gradual, and wisely adapted to the peculiar situation, wants, and habits of our citizens.

"The motion to dissolve the attachment is made on the ground that the defendant is a foreign corporation, and, as such, is not within the act of 1705, nor liable to attachment by the custom of London. The effect of sustaining the motion will be to deny the plaintiffs, citizens of Pennsylvania, all remedy in this State, on a contract made here, and to deprive them of a special lien on the goods attached. It will be for the defendants, then, to show most clearly, that foreign corporations do not come within the intention of the laws regulating attachments.

"When we consider the number of corporations which now exist, their continual increase, the extent of their operations, the establishment of agents within this State for the express purpose of making contracts here, it is difficult to conceive a valid reason why they should be exempted from the operation of laws, which regulate the contracts of individuals and domestic corporations. They are not such favorites in courts of justice, as to claim exemption on that ground.

"The reason of the passage of the act of 1705 is set forth in the preamble to be, 'That the laws of this government have hitherto been deficient in respect of attachments, so that the effects of persons absenting are not equally liable with those of persons dwelling upon the spot, to make restitution for debts contracted or owing within this province, to the great injury of the inhabitants thereof, and the encouragement of such unworthy persons as frequently, by absconding, make advantage of the defect aforesaid.'

"In the third section, 'provided always, that no writ of attachment shall hereafter be granted against any person or persons' effects, but such only as at the time of granting such writs are not resident or residing within this province, or are about to remove, or make their escape, out of the same, and shall refuse to give sufficient security to the complainant for his debt, or other demand, before he depart the said province.'

"It cannot, I think, be reasonably doubted that corporations are within the words of the act. When the word person is used in a statute, corporations as well as individuals are included. As, where the inhabitants of a town are bound to repair a bridge, or to pay taxes, corporations, as well as individuals, are liable.

"Are foreign corporations within the spirit of the act? We are so to construe the act as to suppress the mischief and advance the remedy. The mischief which the legislature intended to remedy was, that the effects of persons, artificial or natural, who were *absent*, were not equally liable with those of persons, artificial or natural, dwelling upon the spot, to make restitution for debts contracted or owing within the province. Foreign corporations and foreign individuals were placed on a better footing before the passage of the act than domestic corporations or citizens of the State; for remedy whereof the act in question was passed, enabling the court to compel an appearance by attachment of their effects within the State.

"It may be proper here to remark, that the act has been already construed to extend to persons who have never been within the State; it has, therefore, the same application to corporations which are stationary as to natural persons. Foreign corporations, it is true, are necessarily absent from the State, but may have effects within it, and may contract and owe debts, to citizens of this State, which they may be unable or unwilling to pay.

"It is no answer to say, that this is a mere question of remedy; that the corporation may be sued in Massachusetts, as in this case, or in Europe or Canton, as the case may be.

"But suppose suit should be commenced within a foreign jurisdiction, judgment obtained, and execution issued, and the company should prove insolvent, (and daily ex-

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corporators reside, but by the place where its charter was granted. With reference to inhabitancy, it is considered as an inhabitant of

perience shows us that this is no improbable supposition,) what would be the remedy against their effects within this State? Relief must depend entirely on the laws of the foreign government. If there was power in their courts to compel an assignment, or to sequester their property, in and out of the State, there might be some remedy, however inadequate, to the creditor. I cannot bring myself to believe, that the legislature ever intended that citizens of Pennsylvania, who had the property within their grasp, or a lien upon it, should be deprived of that lien, and depend for the payment of their debts on the laws of a sister State, or of a foreign government, and the more especially am I unwilling to adopt that construction at this time, when this contract was made, and contracts are daily making by foreign corporations, within the limits of this State, and under the jurisdiction of this court. If this were a case of doubtful construction, the argument *ab inconvenienti* would be exceedingly strong, and would go far with me in the determination of the case.

"But it is said that corporations are not within the act, because it is provided, 'That if the plaintiff in the attachment obtain a verdict, judgment, and execution, for the money and goods in the garnishee's possession, yet the defendant in the attachment *may*, at any time before the money be paid, *put in bail to the plaintiff's action*, upon which the attachment is grounded, whereby the garnishee will and shall be immediately discharged.'

"Granting, merely for the sake of the argument, that 'bail to the plaintiff's action,' as used in the act of assembly, means special bail only, and agreeing, as I certainly do, that a corporation cannot enter special bail, yet it by no means follows that the effects of foreign corporations cannot be attached, under the act of 1705.

"This point has undergone judicial investigation, in the case of Carpentier *v.* The Delaware Insurance Company, 2 Binney, 264. It was there contended, that the plaintiff could not enter a rule of reference, because the defendants were a corporation. That in every case intended to be referred, an appeal was given; but that in no case could it be obtained by the defendant, without entering into a recognizance conditioned to pay the debt and costs, or to surrender him to jail. That a corporation could not give such a recognizance, because it could not be surrendered.

"From this it was inferred, that corporations defendants were not within the act, in the same manner, and by the same arguments as it is here contended that corporations are not within the act of 1705, because bail to the plaintiff's action means special bail, and that they cannot enter such bail. The court, however, decided that the plaintiffs were not prevented from entering a rule of reference; which in effect decided the principal point in this case. If bodies corporate, say the court, are not within the law, it must be because there is something in their nature inconsistent with its provisions; for they are *not expressly excepted*. It is contended they must be excepted by implication, because they are excluded from the benefit of an appeal, which is given on condition incompatible with the nature of a corporation. 'It is clear,' says the Chief Justice, 'that one of the alternatives of this condition is not applicable to a corporation, which is not a natural, but political body, incapable of being surrendered or imprisoned. I agree that the form of the recognizance is not applicable to a body corporate, but from this I draw a different conclusion. I do not infer that the defendant can have no appeal, but that they may have an appeal without entering into any recognizance.'

"In this case, I do not infer that the effects of foreign corporations cannot be attached, but should infer, were it not for considerations which I shall state, that the attachment should be dissolved by entering an appearance without bail."

The views of the Supreme Court of Georgia are as follows: —

"The question is, whether a creditor is entitled to the remedy at law, by attachment, against a foreign corporation, which our statutes give him against a natural person, who is his debtor.

"Persons, by non-residence, and by placing themselves in any one of the several pre-

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the State in which it was incorporated.[1] And where, as is sometimes the case, a corporation is chartered by two or more States, it is a domestic corporation in each of them.[2]

§ 81. *Representative Persons.* In New York, it was held, in a case which arose at an early period, that the statute of that State respecting absent debtors did not warrant proceedings against

dicaments described in the statute, are not amenable to the jurisdiction of the courts, by *the ordinary process of the law.* In such cases, before the passage of the attachment laws, there was no legal remedy by which the payment of debts could be enforced. *That* was the mischief to be remedied. These laws supplied the remedy. The attachment laws are, then, remedial statutes, and are to be construed so as to advance the remedy and to suppress the mischief.

"We disclaim the power of this court to subject corporations to the operation of this act, upon the score of policy, if they are not within its provisions, fairly, reasonably, and liberally construed. We think that corporations are embraced within the provisions of the act, because the terms used in the act, which describe the persons made subject to its operation, are descriptive of corporations. Those words are 'person,' 'party,' 'defendant,' 'debtor.' Either of these words describes a corporation. It is a person under the law, — an artificial person, created by the legislature. It has a name, — a local habitation, too. It is not a citizen in every sense of the word, but it is an inhabitant, — it dwells where by law it is located. A corporation is a 'judicial person,' — a legal entity. For many purposes, it has a legal being. It can contract, own property, grant acquittances, convey titles, become the obligee of a bond, prosecute suits, appear, answer, and defend. Now where the law-making power uses the word *person*, it is to be presumed that the *legal* meaning is intended, and not the social or ordinary meaning. The word is descriptive of all who are, in professional parlance, *persons*. So *party* and *defendant* are words as applicable to corporations as to natural persons; because they may be, equally with natural persons, *parties* and *defendants*. The word, however, used in the act with most significance, and used most frequently, is *debtor*. It would seem that the General Assembly, by using that term, intended to guard against the very construction now combated, to wit, that the act applies only to natural persons. That is a generic term, and embraces all who owe debts, whether natural persons, partnerships, or corporations. These are not merely verbal criticisms. These words constitute material parts of the enacting clauses of the statute, and give to them significance. They define the class of persons which the act makes liable to the process.

"Again, it is clear that a corporation may occupy one of the positions, to wit, the position of a non-resident, in which a debtor must be placed before the attachment can issue. It may reside out of the State, and hence, we infer, that the statute applies to it. We have seen that a corporation is an inhabitant, or resident of the State, where, by law, it is located. In that State, therefore, where it is not located, it is a non-resident. If it does not reside in Georgia, it resides out of the State, and falls into that predicament in which the process by the act is authorized to be issued.

"There is one rule of statutory construction recognized in England, and by the Supreme Court of the United States, which is conclusive of this question. It is this. Corporations are to be deemed and considered as *persons, when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute.*"

[1] Harley *v.* Charleston Steam-Packet Co., 2 Miles, 249; South Carolina Railroad Co. *v.* McDonald, 5 Georgia, 531; Day *v.* Newark I. R. Man. Co., 1 Blatchford, 628; Mineral Point R. R. Co. *v.* Keep, 22 Illinois, 9.

[2] Sprague *v.* Hartford P. & F. R. R. Co., 5 Rhode Island, 233.

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heirs, executors, trustees, or others claiming merely by right of representation.[1] Subsequently this doctrine was recognized and affirmed, under another statute, which the court said was much more explicit than that which was the subject of the former construction. Under this second statute an attachment might be obtained by a creditor "having a demand against the debtor *personally*."[2] The same views have been expressed by the courts of Connecticut, New Jersey, Pennsylvania, South Carolina, Alabama, and Louisiana, and by the United States Circuit Court for the District of Columbia.[3] In Virginia, however, in the proceeding by foreign attachment *in chancery*, it is held, that the heirs of a deceased debtor may be proceeded against, for the purpose of subjecting the property of their ancestor to the payment of his debt,[4] and that a creditor of an absent debtor, who is one of the heirs and distributees of a deceased intestate in Virginia, may go into a court of equity, for the purpose of having a division and distribution of the estate of the decedent, and of procuring payment of his debt out of the share of the absent debtor in the estate.[5]

§ 82. But if an executor or administrator, in the course of the discharge of his duties as such, place himself in a position where he becomes, by the principles of law, personally liable; as, for instance, if he enter upon leasehold property held by his testator or intestate in his lifetime, or receive the rents and profits thereof, he thereby becomes chargeable in the *debet* and *detinet*, or directly on the covenant, as an assignee, and may be proceeded against personally, and need not be named as executor or administrator. Thus, a lessee covenanted that he, his executors, administrators, or assigns would, at his and their own proper costs and charges, pay and discharge all taxes, duties, and assessments which should, during the term, be imposed upon the demised premises; and the lessee died intestate, and letters of administration were granted to

[1] Jackson *v.* Walsworth, 1 Johns. Cases, 372; Metcalf *v.* Clark, 41 Barbour, 45.

[2] Matter of Hurd, 9 Wendell, 465.

[3] Stanton *v.* Holmes, 4 Day, 87; Peacock *v.* Wildes, 3 Halsted, 179; Haight *v.* Bergh, 3 Green, 183; McCoombe *v.* Dunch, 2 Dallas, 73; Pringle *v.* Black, Ibid. 97; Weyman *v.* Murdock, Harper, 125; Taliaferro *v.* Lane, 23 Alabama, 369 Brown *v.* Richardson, 1 Martin, N. S. 202; Debuys *v.* Yerbey, Ibid. 380; Cheatham *v.* Carrington, 14 Louisiana Annual, 696; Patterson *v.* McLaughlin, 1 Cranch, C. C. 352; Henderson *v.* Henderson, Ibid. 469.

[4] Carrington *v.* Didier, 8 Grattan, 260.

[5] Moores *v.* White, 3 Grattan, 139.

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a non-resident, who received the rents, issues, and profits of the demised premises. An assessment was imposed upon the demised premises in the laying out, opening, and continuing of a street, a portion of which the lessor was obliged to pay; who thereupon instituted proceedings by attachment against the administrator, alleging that he was indebted to him *personally*, and the court sustained the attachment.[1]

[1] Matter of Galloway, 21 Wendell, 32.

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CHAPTER V.

AFFIDAVIT FOR OBTAINING AN ATTACHMENT.

§ 83. In nearly all the States, an attachment can be obtained only on the exhibition to the officer authorized to issue it, of evidence of the existence of some fact declared by law to be a ground for issuing the writ. This evidence is always in the shape of an affidavit by the plaintiff, or some one on his behalf. As it is the starting-point of the whole proceeding, — the lever, as it were, by which the jurisdiction of the court is brought into action, — and as the validity of the subsequent proceedings may, so far as the question of jurisdiction is involved, depend on its conformity to statutory requirements; we cannot examine too closely, nor set forth too carefully, the various points which have arisen in connection with it.

§ 84. When a court exercises an extraordinary power, under a special statute prescribing its course, that course ought to be exactly observed, and those facts especially, which give jurisdiction, ought to appear, in order to show that its proceedings are *coram judice*.[1] The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action.[2] Any movement by a court is necessarily the exercise of jurisdiction; and the question in any case before a court is, whether its action is judicial or extrajudicial; with or without the authority of law. If the law confers the power to render a judgment or decree, then the court has jurisdiction: what shall be adjudged or decreed between the parties, is judicial action.[3] These principles apply with force to proceedings by attachment, wherever they rest upon affidavit of the existence of certain facts, without the existence and proof of which the court would have no jurisdiction. When, therefore, no affidavit is made, or that made does not present a legal foundation for the issue of the

[1] Thatcher *v.* Powell, 6 Wheaton, 119.
[2] United States *v.* Arredondo, 6 Peters, 691, 709.
[3] Rhode Island *v.* Massachusetts, 12 Peters, 657, 718; Grignon *v.* Astor, 2 Howard, Sup. Ct. 319, 338.

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writ, the writ and all proceedings under it are *coram non judice* and void, unless the defect be waived by the act of the defendant, or is, by statute, amendable, and be amended.[1] If there be no affidavit, the omission cannot be supplied, even though there be a statute authorizing defects in affidavits to be amended; for an amendment presupposes the existence of an affidavit in a defective form.[2] If there be no statutory authority for amending an affidavit, the court has no power to allow such an amendment.[3]

§ 85. Whenever a defendant, either by motion or plea in abatement, assails an attachment on account of absence of, or insufficiency in, the affidavit, his motion or plea is based, not upon mere irregularity in the proceedings, but upon the ground that the proper foundation has not been laid for the exercise of jurisdiction over him in that particular mode. If his motion or plea be sustained, the attachment proceeding falls to the ground, and cannot, without special statutory aid, be reinstated or continued in existence; for without such aid no amendment can be made. This, however, is not the matter now to be discussed; as it is of minor importance compared with the question whether, and to what extent, attachment proceedings may be assailed collaterally, on account of infirmity in the affidavit. If vulnerable at all in this respect, when drawn in question collaterally, it must be for want of jurisdiction; for no principle is better established than that mere errors and irregularities in judicial proceedings cannot be taken advantage of collaterally; unless it be the principle, that want of jurisdiction may be shown by any one against whom rights are claimed through the proceedings. This subject, therefore, lies at the very foundation of the whole proceeding by attachment, and is worthy of very careful consideration.

§ 86. As will be more fully shown in a succeeding portion of

[1] Smith *v.* Luce, 14 Wendell, 237; *Ex parte* Haynes, 18 Ibid. 611; *Ex parte* Robinson, 21 Ibid. 672; *In re* Faulkner, 4 Hill (N. Y.), 598; *In re* Bliss, 7 Ibid. 187; Mantz *v.* Hendly, 2 Hening & Munford, 308; McReynolds *v.* Neal, 8 Humphreys, 12; Maples *v.* Tunis, 11 Ibid. 108; Wight *v.* Warner, 1 Douglass, 384; Buckley *v.* Lowry, 2 Michigan, 418; Clark *v.* Roberts, 1 Illinois (Breese), 222; Cadwell *v.* Colgate, 7 Barbour, 253; Bruce *v.* Cook, 6 Gill & Johnson; 345; Kennedy *v.* Dillon, 1 A. K. Marshall, 354; McCulloch *v.* Foster, 4 Yerger, 162; Conrad *v.* McGee, 9 Ibid. 428; Whitney *v.* Brunette, 15 Wisconsin, 61.

[2] Greenvault *v.* F. & M. Bank, 2 Douglass, 498.

[3] Brown *v.* McCluskey, 26 Georgia, 577; Cohen *v.* Manco, 28 Ibid. 27.

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this chapter,[1] an attachment issues, in some States, as a matter of right, upon affidavit being made that some certain fact exists; while in others it is required that the officer shall be satisfied, by affidavit presented to him, of the existence of the fact. In the former case the officer's duty is merely ministerial, involving no inquiry on his part, except as to whether the particular fact is sworn to; in the latter, his functions are judicial, as well as ministerial: he must be satisfied judicially, by the affidavit presented to him, not merely that the fact is sworn to, but that the evidence is sufficient to prove that it really exists. It will be noticed that the cases about to be cited, in which attachments have been successfully assailed collaterally, on account of insufficient affidavit, have arisen under both of these systems.

§ 87. One aspect of this subject is that in which the attachment bears upon the garnishee. He stands in a collateral position, — that of a mere stake-holder between other contending parties; and if he is to be affected by the extraordinary power exercised over him, he is entitled to see that the action of the court will protect him, in the future, against all persons. This it will not do, if the court act without jurisdiction. It has, therefore, been held in Maryland, that if the affidavit do not show the facts necessary to establish the jurisdiction of the court over the defendant by attachment, the garnishee may take advantage of it, at any stage of the proceeding.[2] In the cases in which this rule was established, the

[1] Post, §§ 97–100.

[2] Shivers *v.* Wilson, 5 Harris & Johnson, 130; Yerby *v.* Lackland, 6 Ibid. 446; Bruce *v.* Cook, 6 Gill & Johnson, 345. In the first of these cases the court say: "No position in law is more clearly established, than that a defendant in a cause, before a court of *general* jurisdiction, must, if he wishes to avail himself of the disability of the plaintiff to sue, do so by a plea in abatement; and no principle of law is more evident, than that where the tribunal is of a *limited* jurisdiction, or the proceedings are particularly described by a statute made on the subject, that course of procedure, so described, must, on the face of the record, appear to have been, if not literally, at least substantially, complied with; or the case must by the proceedings disclose itself to be within the limited jurisdiction. It follows, from the preceding principles, that the decision of the court below [which in effect quashed the attachment and discharged the garnishee], must be sustained, if it had but a limited jurisdiction, or if its course of proceeding was of a circumscribed description, unless, on the face of the record, the case shall appear to have been within the jurisdiction, or the course of proceeding directed by law to have been substantially complied with. . . . . The record before the court in this case, in no part of it brings the plaintiff within that description of persons who had a right to issue, or cause the attachment to have issued. The right to condemn the property in favor of such a plaintiff, is by no law vested in the court before whom the cause was tried, or in any other court."

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affidavits were defective, in not showing the plaintiff to have been a citizen of Maryland, or of any other of the United States. In Mississippi, a judgment against a garnishee was reversed and the attachment dismissed, because the record showed no affidavit for the attachment.[1] In both Maryland and Mississippi, an attachment issues upon an affidavit showing particular facts merely, without the officer being required to be satisfied judicially that the facts really exist.

§ 88. But a much more important class of cases in this connection, are those in which title to property is claimed through an attachment, where the defects in the proceedings have not been cured by the appearance of the defendant. Such have arisen in New York, where the officer issuing the attachment acts judicially, in determining whether the facts stated in the affidavit establish the ground of attachment; and in Tennessee, where the writ issues upon affidavit simply of the existence of certain facts. In both States the cases in which the question arose were actions of ejectment. In New York, the plaintiff claimed title as a purchaser at a sale made by trustees, appointed under the law of that State, in a proceeding by attachment; the trustees being there empowered to sell the property attached. The title thus set up was assailed for want of jurisdiction in the officer who issued the attachment, because of the defective character of the affidavits, in not laying a sufficient ground for its issue. The court went into an examination of the affidavits, and declared them insufficient, and held that the attachment was void; that the subsequent proceedings fell with it; and that the sale by the trustees conferred no title on the purchaser. "There was," said the court, "conferred upon the judge who issued the attachment a special and limited jurisdiction. It is well settled, that when certain facts are to be proved to a court having only such a jurisdiction, as a ground for issuing process, if there be a total defect of evidence as to *any* essential fact, the process will be declared void, in whatever form the question may arise. But when the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid until it is set aside by a direct proceeding for that purpose. In one case, the court acts without authority; in

[1] Ford *v.* Woodward, 2 Smedes & Marshall, 260.

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the other, it only errs in judgment upon a question properly before it for adjudication. In one case, there is a defect of jurisdiction; in the other, there is only an error of judgment. Want of jurisdiction makes the act void; but a mistake concerning the just weight of evidence only makes the act erroneous, and it will stand good until reversed." [1]

The cases in Tennessee are precisely of the same character. In one of them the court used the following language: "It appears from the record of these proceedings, that the affidavit was defective, in not stating the cause for which the attachment issued, whilst the attachment is good in point of form, and assumes, in effect, that a perfect affidavit was made. It is now insisted, that the writ of attachment shall be conclusive as to all the material facts it assumes, and that it can neither be aided or impaired by reference to the affidavit required in such cases; that the affidavit is not required to be recorded with the other proceedings in the Circuit Court, and that therefore we can take no judicial notice of it. It will be observed, however, by reference to the act just referred to, that it is required that the affidavit be made part of such record. We think it a reasonable and proper rule, that the validity of this description of judicial sales shall be tested by the record of the Circuit Court, made in pursuance of the statute. It was intended by the statute, that such record should be the proper and permanent memorial of the validity of the sale. The affidavit forms a material part of the record, and we think we are not precluded by the writ of attachment from taking judicial notice of it. . . . . The affidavit was materially defective, and was not amended. The consequence is, that the judgment and execution on the attachment were void, and the sale communicated no title to the purchaser." [2]

§ 89. The views thus expressed are undoubtedly based on sound legal principles, and indicate the necessity for great circumspection in laying an unquestionable foundation in *ex parte* proceedings, for the exercise of the jurisdiction of the court. Where, however, the defendant is served with process, the case is different. There, he may come in and move to set aside, quash,

[1] Staples *v.* Fairchild, 3 Comstock, 41.

[2] Maples *v.* Tunis, 11 Humphreys, 108; Conrad *v.* McGee, 9 Yerger, 428. See Wilson *v.* Arnold, 5 Michigan, 98.

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or dissolve the attachment because of defect in the affidavit; and if his motion be sustained, the property will be discharged from the attachment, leaving the action to proceed against him in the ordinary way, or to be dismissed, according to the particular system of practice under which it is brought. But if he waive this right, and suffer judgment to be rendered against him, the rights acquired under the judgment no longer depend on the attachment for their validity, and cannot be affected by defects in the jurisdictional basis of the attachment. They rest upon the judgment, which is valid, and cannot be collaterally impeached.[1]

§ 90. The affidavit is unquestionably a part of, and must appear in, the record of the attachment suit.[2] If it be there, but not filed, the fact that it was delivered to the officer before the writ issued, and was the ground for its issue, but that he failed at the time to file it, may be proved by him orally, so as to sustain the proceeding, and authorize the affidavit to be filed *nunc pro tunc*;[3] but where no affidavit appears, no evidence — save, perhaps, in the case of loss or destruction — is admissible to prove that one was made. Even a recital in the writ to that effect will not prove the fact, or sustain the proceeding.[4]

§ 91. In practice, the first point to be ascertained is, whether, in fact, an affidavit was made. There may be in the record what was designed for, and yet may not be, an affidavit, because not properly authenticated. The absence of the party's signature does not prove that he was not sworn, for it is not necessary to constitute an affidavit, unless required by statute, that the party making should sign it.[5] It is otherwise, however, where there is no official authentication; though, under some circumstances,

[1] Toland *v.* Sprague, 12 Peters, 300.

[2] Shivers *v.* Wilson, 5 Harris & Johnson, 130; Ford *v.* Woodward, 2 Smedes & Marshall, 260; Maples *v.* Tunis, 11 Humphreys, 108; Conrad *v.* McGee, 9 Yerger, 428; Staples *v.* Fairchild, 3 Comstock, 41.

[3] Simpson *v.* Minor, 1 Blackford, 229.

[4] Bond *v.* Patterson, 1 Blackford, 34. In Biggs *v.* Blue, 5 McLean, 148, the Circuit Court of the United States for Ohio, in a case in which an attachment proceeding was assailed collaterally, because the record showed no affidavit, held that the court could not presume there was no affidavit, from its not being copied into the record. This was simply the point decided. The case, it seems, did not require the court to go further, and say how the want of an affidavit in such case could be proved, unless by its not appearing in what purported to be a complete record of the attachment cause.

[5] Redus *v.* Wofford, 4 Smedes & Marshall, 579; Bates *v.* Robinson, 8 Iowa, 310. *Sed contra*, Cohen *v.* Manco, 28 Georgia, 27.

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that has been supplied by implication from the contents of the record, and even by parol proof. Thus, where that appeared among the papers, which wanted only the signature of the judge to the *jurat*, to make it a complete affidavit, and across the face of the document were written the words, "sworn and subscribed before me," in the handwriting of the judge, but not signed by him; and immediately below, and on the same paper, was written the order for the attachment to issue, which was signed by him; and both the unfinished *jurat* and the order bore the same date; and the order recited that the judge had read the petition, affidavit, and the documents annexed; it was held, that he acted on the paper as an affidavit sworn to before himself; and in signing the order containing that expression, he, by the strongest implication, certified that it had been sworn to before himself; and that the want of his signature to the *jurat* was no sufficient ground for dissolving the attachment.[1] So, where the affidavit was stated in the *jurat* to have been sworn to before one who signed his name, without adding thereto any official designation, but the writ was signed by a person in the same name, as clerk of the court in which the suit was brought; the court presumed that the affidavit was sworn to before the same officer.[2] But where the papers do not justify such an implication, the absence of an official attestation to the affidavit has been held to be fatal to it.[3] In Alabama, however, in a case of this description, it was considered, that upon a motion to quash the attachment, everything disclosed by the proceedings should be taken to be true; that the court would suppose the affidavit to have been regularly taken; and that if such was not the fact, it was to be taken advantage of by plea in abatement, and not by motion to quash.[4] Afterwards, in another case, of identical character, the defendant pleaded in abatement the want of the signature of the officer; to which the plaintiff replied that the affidavit was in point of fact made; to which replication the defendant demurred; and it was held, that the plea was fully answered by the replication, and that, though it would have been more regular for the officer to have certified the affidavit, the court were not prepared to say that his omission to do so necessarily vitiated the proceedings.[5]

[1] English *v.* Wall, 12 Robinson (La.), 132.
[2] Singleton *v.* Wofford, 4 Illinois (3 Scammon), 576.
[3] Birdsong *v.* McLaren, 8 Georgia, 521.
[4] Lowry *v.* Stowe, 7 Porter, 483. [5] McCartney *v.* Branch Bank, 3 Alabama, 709

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§ 92. The next matter to be determined is, whether a particular affidavit, relied on to sustain the attachment, was, in fact, *made in the attachment suit.* This would seem to be easily ascertainable, by the title of the affidavit, or by its connection with the papers in the cause; but still, there are reported cases on this point. An affidavit having no title, not referring to the summons or any other paper having the title, not stating who the deponent is, or what he has to do with the suit, or who is plaintiff or defendant, was held to be too indefinite to be the basis of an attachment.[1] But in Arkansas, where the affidavit was not entitled in the suit, and did not describe the person who made it, as plaintiff, or the debtor named in it as defendant, and was not attached to any of the original papers in the cause, it was considered sufficient.[2]

§ 93. There is ordinarily no difficulty in ascertaining whether the affidavit was made by one authorized by statute to make it; for the statutory terms are usually sufficiently clear. Where the law explicitly requires it to be made by the plaintiff, and mentions no other person by whom it may be made, the rule applied to attachment bonds under like circumstances, that the act can be done by no other than the plaintiff,[3] would perhaps be established; though the Supreme Court of Alabama refused to do so.[4] In the nature of things, however, such a rule would be subject to exceptions. Thus, it has been held, under such a statute, that an affidavit in an action by a corporation may be made by its agent.[5] So, where a suit was brought by A. to the use of B., and B.'s agent, describing himself as such, made the affidavit, it was considered that this met the terms of a statute requiring "the party applying for the attachment, his agent, attorney, or factor" to make the affidavit.[6] In Louisiana, however, it was held, that an affidavit made by a third person, not appearing to have any knowledge of the matter, was bad.[7] If it appear, however, by the record, that the affiant is a party to the suit, it is not necessary for him to make in the affidavit any allegation of his interest therein.[8]

[1] Burgess *v.* Stitt, 12 Howard Pract. R. 401.
[2] Cheadle *v.* Riddle, 6 Arkansas (1 English), 480; Kinney *v.* Heald, 17 Ibid. 397.
[3] Myers *v.* Lewis, 1 McMullan, 54; Mantz *v.* Hendley, 2 Hening & Munford, 308; Pool *v.* Webster, 3 Metcalfe (Ky.), 278.
[4] Flake *v.* Day, 22 Alabama, 132.
[5] Trenton Banking Co. *v.* Haverstick, 6 Halsted, 171.
[6] Murray *v.* Cone, 8 Porter, 250.
[7] Baker *v.* Hunt, 1 Martin, 194.
[8] Bosbyshell *v.* Emanuel, 12 Smedes & Marshall 63.

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§ 94. If a statute authorize an affidavit to be made by the plaintiff's agent or attorney, and it be made by a person other than the plaintiff, the affiant must be described in the affidavit as such agent or attorney, or the affidavit will be insufficient. Thus, where the petition was signed by "F. & F., attorneys for plaintiffs," and the affidavit was made by "B. F. F.," without describing himself as agent or attorney, the court said it could not know that the affiant was one of the persons who signed the petition as attorneys for the plaintiffs, nor would it look to other parts of the record to find information which ought to be contained in the affidavit itself.[1] Where an affidavit may be made by an attorney, that term is not confined to an attorney in fact, but includes an attorney at law.[2] But in Louisiana, it was held not to authorize an attorney at law, residing in another State, and employed to attend in the State of his residence to the collection of a debt, to come into Louisiana, without special authority from his client, and take out an attachment, making the affidavit himself.[3] When a statute permits an affidavit to be made by an agent, it is said that if he swear "to the best of his knowledge," it will be sufficient.[4] So, where an attorney made affidavit of the nature and amount of the defendant's indebtedness, "upon information and belief derived from and founded upon the written admissions of the defendant, then in the attorney's possession," it was held sufficient.[5] But where he is required by the statute to swear "to the best of his knowledge and belief," it is not sufficient that he swear "to the best of his belief."[6] And in such case it need not be stated in the affidavit that the affiant made it for the plaintiff; it will be presumed that he did so.[7] Nor need he swear that he is an agent or attorney of the plaintiff, if he so describe himself in the affidavit.[8] Where the statute authorized an affidavit to be made by an agent or attorney, if the plaintiff be absent from the county, "*in which case the affidavit shall state his absence*," the omission of this statement from an affidavit made by an attorney was held to vitiate it.[9]

[1] Willis *v.* Lyman, 22 Texas, 268.
[2] Clark *v.* Morse, 16 Louisiana, 575; Austin *v.* Latham, 19 Ibid. 88.
[3] Wetmore *v.* Daffin, 5 Louisiana Annual, 496.
[4] Bridges *v.* Williams, 1 Martin, N. S. 98.
[5] Howell *v.* Kingsbury, 15 Wisconsin, 193.
[6] Bergh *v.* Jayne, 7 Martin, N. S. 609.
[7] Mandel *v.* Peet, 18 Arkansas, 236.
[8] Wetherwax *v.* Paine, 2 Michigan, 555. [9] Pool *v.* Webster, 3 Metcalfe (Ky.), 278

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§ 95. In every affidavit for an attachment, there are two distinct parts, one relating to the amount due from the defendant to the plaintiff, the other to the facts relied on as a ground for obtaining the writ.

In regard to the first, it is as necessary to comply with all the requirements of the law, as it is in reference to the second. If the law prescribe the terms in which the plaintiff shall substantiate his claim, those terms must be fulfilled, or the attachment will fail. Thus, where the law required the affidavit to declare that the plaintiff's claim *is just*, the omission of that declaration is fatal, though in every other respect the affidavit be unexceptionable.[1] And so, under the same law, if the affiant states that he believes the plaintiff ought to recover the amount of the demand sued on.[2]

It is no objection to an affidavit that the facts set forth in it would seem to show that the plaintiff might have claimed a larger sum in the suit than he did.[3] And it is not essential that the amount should be set forth *in terms* in the affidavit, if the form of pleading be such as to require it to be stated in the petition, and it be there stated, and be referred to in the affidavit as the sum for which the attachment is obtained.[4] Such, however, would not be the case where the common law forms of pleading are preserved. But where the cause of action and the ground of attachment are required to be both set forth in the petition, and the affidavit subjoined refers only to the latter, the attachment cannot be sustained, for there is nothing showing, under oath, what amount was due.[5]

The following case came up in Louisiana, where it is required by the Code of Practice that the plaintiff shall make a declaration under oath, at the foot of the petition, "*stating the amount of the sum due him.*" The affidavit stated that the defendants were indebted to the plaintiff "in a sum exceeding two thousand dollars"; and it was decided that it was specified with sufficient certainty that *at least* that sum was due, and that the attachment might well lie for that sum, and as it did not issue for a greater,

[1] Worthington *v.* Cary, 1 Metcalfe (Ky.), 470

[2] Taylor *v.* Smith, 17 B. Monroe, 536.

[3] Henrie *v.* Sweasey, 5 Blackford, 273.

[4] Boone *v.* Savage, 14 Louisiana, 169; Souberain *v.* Renaux, 6 Louisiana Annual, 201; Morgan *v.* Johnson, 15 Texas, 568.

[5] Blakely *v.* Bird, 12 Iowa, 601; Price *v.* Merritt, 13 Louisiana Annual, 526.

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it could not be dissolved.[1] Under the same law, however, it was held, that where any sum the plaintiff might state would be conjectural, it could not serve as the basis of a positive oath, and an attachment would not lie; the case being that of one partner suing another for a specific amount, as a debt resulting from the partnership transactions, when there had been no settlement of the partnership accounts.[2]

Where the law required the plaintiff to "make oath to the debt or sum demanded, and that no part of the same is paid, and that he doth not in any wise, or upon any account whatever, stand indebted to the defendant," a plaintiff made affidavit to the amount of his claim and that no part thereof was paid, and "that he is indebted to the defendant some small amount, but he does not know how much, contracted since this note was given"; and it was held a sufficient affidavit.[3]

In Georgia this case is reported. The affidavit stated that the defendant "was indebted to the plaintiff in the sum of one thousand dollars, which may be subject to a set-off, for an unascertained sum which, on final settlement, will be due the defendant from plaintiff, for certain improvements," &c. It was objected that no sum certain was sworn to, but the court held otherwise, saying: "Any debt may be subject to be set off by another debt. But until one debt has been set against another, both remain debts. When there is an action, there can be no set-off, until the defendant has done something showing a willingness in him for his debt to be set against the plaintiff's debt."[4]

Under a statute requiring "an affidavit, stating that the defendant is indebted to the plaintiff, and specifying the amount of such indebtedness as near as may be, over and above all legal set-offs," an affidavit was held bad, which stated that the defendant was indebted to the plaintiff "in the sum of $1657.90, *as near as this deponent can now estimate the same*, over and above all legal set-offs." The court said: "The statute gives no latitude of *statement in the affidavit* as to the amount due. Some fixed and definite sum, to which the affiant can positively depose, must be named. In estimating the amount, so positively stated, the utmost exactness is not required. It may be a little more or a little

[1] Flower *v.* Griffith, 12 Louisiana, 345.
[2] Levy *v.* Levy, 11 Louisiana, 581.
[3] Turner *v.* McDaniel, 1 M'Cord, 552.
[4] Holston Man. Co. *v.* Lea, 18 Georgia, 647.

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less than the real amount without vitiating the proceedings, provided that the sum be such that the affiant can conscientiously depose to its correctness. But the amount named must be certain, leaving no room for speculation on the face of the affidavit."[1]

§ 96. If the statute do not require it to be stated how the debt accrued, it is no objection to the affidavit that it is not stated;[2] but if required, a failure to state it will be fatal to the affidavit.[3] If the affidavit make no reference to the declaration or petition, as indicating the cause of action, it will be understood as being the same therein set forth; and if it state that the defendant is indebted in any other manner than as therein declared, it will be bad; for the debt sued on must be the one sworn to.[4] Where a statute required the plaintiff to state in his affidavit the nature and amount of the defendant's indebtedness, a statement that the defendant was indebted "in the sum of fourteen hundred dollars by his certain instrument of writing signed by him," was deemed sufficient.[5]

§ 97. The most important point in the affidavit is that which sets forth the grounds on which the attachment is sued out; and it is in reference to that, that the great mass of the decisions concerning affidavits have been rendered.

This subject presents itself, under different statutes, in three distinct phases: I. Where the affidavit is required simply to state the existence of a particular fact, declared by law to be a ground of attachment; II. Where the existence of such fact must be proved to the satisfaction of some named officer; and III. Where the officer must be satisfied of the existence of such fact, by proof presented to him of the facts and circumstances which go to establish its existence. Let us examine these points.

§ 98. I. *Where the affidavit must state simply the existence of a particular fact, as a ground of attachment.* Here, nothing is requisite but conformity to the language of the statute. The affidavit,

[1] Lathrop *v.* Snyder, 16 Wisconsin, 293.
[2] Starke *v.* Marshall, 3 Alabama, 44; O'Brien *v.* Daniel, 2 Blackford, 290.
[3] *In re* Hollingshead, 6 Wendell, 553; Smith *v.* Luce, 14 Ibid. 237.
[4] Cross *v.* Richardson, 2 Martin, N. S. 323.
[5] Phelps *v.* Young, 1 Illinois (Breese), 255.

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as we shall presently see, need not be literally according to the words of the law; a substantial compliance is sufficient.[1] The officer whose duty it is to issue the writ, inquires only whether there is this conformity. If he finds it to exist, he issues the writ, in a ministerial, not in a judicial, capacity. He is not to be satisfied judicially that the alleged fact is true; but is simply to see whether it is sworn to. If sworn to, he is fully justified in issuing the process, and cannot be affected by any subsequent ascertainment of the groundlessness or falsity of the affidavit.

§ 99. II. *Where the existence of the ground of attachment must be proved to the satisfaction of the officer.* In this case, the officer acts in a judicial, as well as a ministerial capacity. His judgment must be satisfied that the fact exists, before he issues the writ. Hence, evidence must be presented to, and acted on by, him. He cannot act upon his own knowledge, or mere belief, however well founded it may be, nor upon report or information. If proof be presented to him, a mere error in judgment as to its legality or sufficiency will impose no liability on him; but there must be *some* proof. If he issues the writ without proof, he is liable to the defendant as a trespasser.[2] If the proof has a legal tendency to make out the case required by the statute, although it be so slight and inconclusive that, upon a direct proceeding to review it, the officer's action in granting the writ would be reversed, yet in a collateral action the process will be deemed valid. It will be so deemed because the officer, having proof presented to him, and being required by law to determine upon the weight of the proof, has acted judicially in making his determination. His decision may be erroneous, but is not void.[3]

The first point, then, to be determined is, what is competent evidence to present to the officer? It must be legal evidence,—not the plaintiff's own oath, unless the statute expressly say so.[4]

The next point is, what is sufficient proof? The Supreme Court of New York sustained an attachment issued by a justice of the peace, upon affidavits made by witnesses that they *believed* the defendant resided out of the State. The court held the proof sufficient.[5] The legislature of that State afterwards modified the

[1] Post, § 107.
[2] Vosburgh *v.* Welch, 11 Johns. 175.
[3] Skinnion *v.* Kelley, 18 New York, 355; Hall *v.* Stryker, 27 Ibid. 596.
[4] Brown *v.* Hinchman, 9 Johns. 75.
[5] Matter of Fitch, 2 Wendell, 298.

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statute, so as to prevent the issue of attachments on the ground of mere belief; but COWEN, J., after the change, upon a review of the authorities in similar cases in other branches of the law, said that under the previous statute, — the same which was construed in the decision of the Supreme Court just referred to, — he should not hesitate in receiving the oath of mere belief.[1]

§ 100. III. *Where the officer must be satisfied of the existence of the ground of attachment, by proof of particular facts and circumstances tending to establish its existence.* In this case, as in the last, the officer acts both judicially and ministerially. He passes judicially upon the competency of the evidence, and also upon the sufficiency of the proof to establish the existence of the ground of attachment. For instance, if the statute authorize an attachment "whenever it shall satisfactorily appear to the officer that the defendant is about to remove from the county any of his property, with intent to defraud his creditors," and require nothing more, it would be a case of the description mentioned under the next preceding head; and under the views expressed by the New York court, an affidavit of belief would be sustained, if the officer acted upon it as sufficient: but if the statute go further and require that, before the attachment shall issue, "the plaintiff shall prove to the satisfaction of the officer the *facts and circumstances* to entitle him to the same," then a new exigency is created, requiring evidence, which he shall deem competent, to be given of those facts and circumstances; and that the facts and circumstances, when proved, shall satisfy him that the particular ground of attachment relied on, exists. Hence, though the facts and circumstances be proved by competent evidence, if they do not in his judgment prove the main fact, he should not issue the writ; and if he do issue it, his action is liable to be revised and overruled, either on the ground that the evidence submitted to him was incompetent, or that it was insufficient.

In reference to the affidavit in such a case, it has been decided, that the *belief* of the affiant that the defendant was about to do a particular act, the impending performance of which would authorize an attachment, would not sustain an attachment. "The plaintiff's own belief," said the court, "is neither a fact nor a circumstance upon which the justice can exercise his judgment. It is

[1] *Ex parte* Haynes, 18 Wendell, 611.

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not sufficient that the plaintiff is satisfied of the unlawful acts or intentions of the defendant. The justice must be satisfied, and he must be so satisfied from proof of facts and circumstances; not the belief of any one."[1] It has likewise been held, that an affidavit stating the *information and belief* of the party making it, as to certain facts, is not sufficient proof to authorize the writ to issue.[2] And though the affidavit was unqualified in its terms that the defendant had left the State with intent to defraud his creditors, it was held insufficient, because it did not state the facts and circumstances. The court said: "Affirming that a party has left the State with intent to defraud his creditors, may be predicated more upon matters of opinion, or belief, than upon fact. The affirmant may honestly believe, and thus affirm it in general terms; whereas, if called to state the facts and circumstances upon which he reached the conclusion, the officer (being unable to exercise his judgment in the matter) might well differ from him."[3] But where the matter to be proved is in itself a single and complete fact, not depending on other facts and circumstances to establish its existence, an affirmation of the fact in direct terms is sufficient. Such is the case where the non-residence of the defendant is the ground of attachment. There, no "facts and circumstances" are needed to prove the non-residence: itself is the fact and circumstance.[4] But in such case of a single fact, no more than in any other, is the affidavit of *belief* competent proof.[5]

While, however, it is not sufficient for an affidavit to state certain facts merely upon the information and belief of the party, yet information is not to be entirely rejected as evidence. Thus, where the allegation is, that the debtor has absented himself from his residence in an illegal manner, information obtained from his family, on inquiry at his residence, may be admitted, *in connection with other facts*, to show that he has left home; when he went away; where, and upon what business he went; and how long he intended to be absent. But such evidence, obtained from other sources, would not be admissible. The informant should be called. It may be, too, that the party making the affidavit should be al-

[1] Smith *v.* Luce, 14 Wendell, 237; Mott *v.* Lawrence, 17 Howard Pract. R. 559.

[2] Tallman *v.* Bigelow, 10 Wendell, 420; *Ex parte* Haynes, 18 Ibid. 611; Matter of Faulkner, 4 Hill (N. Y.), 598; Matter of Bliss, 7 Ibid. 187; Pierse *v.* Smith, 1 Minnesota, 82; Morrison *v.* Lovejoy, 6 Ibid. 183.

[3] *Ex parte* Robinson, 21 Wendell, 672.

[4] Matter of Brown, 21 Wendell, 316. [5] Kingsland *v.* Cowman, 5 Hill (N. Y.), 608.

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lowed to speak upon information concerning the solvency of the debtor, provided the information come from persons who are not interested in the proceedings against him. But an affidavit that the party has been informed and believes that the debtor is insolvent, that he owes a large amount of money, or the like, without the addition of any fact within the knowledge of the party, or stating when or from whom the intelligence was received, cannot be regarded as of any legal importance.[1] But where, in any case, information is allowed to be stated in the affidavit, it will be of no value, unless the party swear that he believes it to be true.[2]

§ 101. Usually the plaintiff may allege as many grounds of attachment, within the terms of the law, as he may deem expedient. In doing so, the several grounds should be stated cumulatively; and if any one of them be true, it will sustain the attachment, though all the others be untrue.[3] An affidavit alleging one *or* the other of two or more distinct grounds, would be bad, because of the impossibility of determining which is relied on to sustain the attachment. Thus, under a statute which authorized an attachment, — 1. Where the defendant is about to remove his effects; 2. Where he is about to remove privately out of the county; and 3. When he absconds or conceals himself, so that the ordinary process of law cannot be served on him; an attachment was obtained, on an affidavit that the defendant "was about to remove from and without the limits, or so absconds and conceals himself, that the ordinary process of law cannot be served on him"; and it was set aside. The first member of the oath was plainly not within the statute, and though the latter was, yet it was rendered inefficient by its connection with the former, through the disjunctive conjunction *or*, whereby it became uncertain which state of facts existed.[4] Subsequently the same court, in a similar case, ruled the same way again, and intimated that they would consider an affidavit, in the disjunctive, as bad, although either of the facts deposed to might be sufficient.[5]

[1] Matter of Bliss, 7 Hill (N. Y.), 187. [2] Decker *v.* Bryant, 7 Barbour, 182.

[3] McCollem *v.* White, 23 Indiana, 43.

[4] Hagood *v.* Hunter, 1 M'Cord, 511; Barnard *v.* Sebre, 2 A. K. Marshall, 151; Davis *v.* Edwards, Hardin, 342.

[5] Devall *v.* Taylor, Cheves, 5; Jewel *v.* Howe, 3 Watts, 144; Wray *v.* Gilmore, 1 Miles, 75; Shipp *v.* Davis, Hardin, 65; Hawley *v.* Delmas, 4 California, 195; Rogers *v.* Ellis, 1 Handy, 48; People *v.* Recorder, 6 Hill (N. Y.), 429; Stacy *v.* Stichton, 9 Iowa, 399; Hopkins *v.* Nichols, 22 Texas, 206.

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§ 102. Let it be observed, however, that where the disjunctive *or* is used, not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same results, the construction just mentioned would be inapplicable. For instance, where the statute authorized an attachment when "the defendant absconds, or secretes himself," it was considered that, from the difficulty of determining which was the fact, the language comprised but one ground, and the disjunctive *or* did not render the affidavit uncertain.[1] "It is," said the court, "often difficult, if not impracticable, for the creditor to ascertain whether his debtor absconds or secretes himself: he has to rely frequently upon such information as his family or friends will give him, which cannot always be confided in: hence, to allow sufficient latitude to the creditor in making his affidavit, and to prevent failures, from having mistaken the cause why the debtor is liable to the remedy, the law has very properly provided for its issuance in the alternative."[2]

Under a similar statute, the same view has been expressed in Tennessee. The language of the statute was, "so absconds or conceals himself that the ordinary process of law cannot be served on him." It was contended that "absconds" constituted one cause, and "conceals" another; but the court did not so hold. "For," said the court, "although the two words are connected by *or* instead of *and*, yet the sense of the sentence shows that *or* is used copulatively, constituting both 'absconds' and 'conceals,' or either of them, a sufficient cause for suing out the attachment. In the nature of things, a plaintiff cannot tell whether a party absconds or conceals himself. He may suppose he absconds, when he only conceals himself, and *vice versa*. To compel him to swear that the party is doing the one only, would involve the plaintiff in endless difficulty. Besides the question of conscience that must always exist with the party about to take the oath, he would be constantly in danger of having his attachment abated on the plea of the defendant, who, though he might not have absconded, was nevertheless concealed, or, if not concealing himself, may have been absconding. We think, therefore, that the words 'so absconds or conceals himself' constitute but one cause."[3] And so, in Missis-

[1] Johnson *v.* Hale, 3 Stewart & Porter, 331. [2] Cannon *v.* Logan, 5 Porter, 77.

[3] Conrad *v.* McGee, 9 Yerger, 428; Goss *v.* Gowing, 5 Richardson, 477; Commercial Bank *v.* Ullman, 10 Smedes & Marshall, 411; Hopkins *v.* Nichols, 22 Texas, 206.

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sippi, under a statute allowing attachment, on affidavit that the defendant "hath removed, or is removing out of the State, or so absconds, or privately conceals himself, that the ordinary process of law cannot be served on him." The affidavit was in the very words of the statute, and was objected to, because in the alternative; but the court held it sufficient; considering that the material point required by the statute was, that the ordinary process could not be served, and that the plaintiff might well know that, without knowing whether the defendant had removed, absconded, or concealed himself.[1] And in New York, an affidavit that the defendant "has secretly departed from this State, with intent to defraud his creditors, or to avoid the service of civil process, or keeps himself concealed therein with the like intent," was sustained.[2]

§ 103. While it is always a safe rule to follow strictly the language of the statute, it is not in every case necessary. Qualifying words should not be omitted; but the omission of words which have not that character, while, by those remaining, the sense and scope of the law are fulfilled, will not vitiate the affidavit. For example, where it was required that the affidavit should state that the defendant was "justly indebted" to the plaintiff, it was considered that the word "justly" was not intended to qualify the word "indebted," and that its omission from the affidavit was no material defect.[3] So, where the statute required the affidavit to state that the defendant "is in some manner about to dispose of his property with intent to defraud his creditors," it was held, that the omission of the words "in some manner" did not vitiate the affidavit.[4] So, under a statute requiring an affidavit that the defendant is justly indebted to the plaintiff "in a sum exceeding fifty dollars," and that the sum should be specified, it was held, that a statement of the defendant's indebtedness in the sum of $300 was sufficient, without inserting the words, "in a sum exceeding the sum of fifty dollars."[5] But under a statute requiring the affidavit to state that the indebtedness sworn to "is due upon contract

[1] Bosbyshell *v.* Emanuel, 12 Smedes & Marshall, 63.
[2] Van Alstyne *v.* Erwine, 1 Kernan, 331.
[3] Livengood *v.* Shaw, 10 Missouri, 273. *Sed contra*, Thompson *v.* Towson, 1 Harris & McHenry, 504.
[4] Drake *v* Hager, 10 Iowa, 556.
[5] Hughes *v.* Martin, 1 Arkansas, 386; Hughes *v.* Stinnett, 9 Ibid. 211.

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express or implied," it was held, that the word *due* was intended, not only to show that the demand arose upon contract, but also as indicating that the time for the payment of the debt has arrived; and that the omission to aver that the debt was "due upon contract" was fatal, though from the terms of the affidavit it was very clear that it arose from contract.[1]

§ 104. Uncertainty in the affidavit will vitiate it. Thus, where the law required the affidavit to show that the cause of action was founded on contract, and the plaintiff did not swear positively to a contract, but stated certain facts, from which perhaps a jury might infer a contract, and perhaps not; the affidavit was held insufficient.[2] And where an affidavit stated that the defendant "is justly indebted to plaintiff (in a specified sum) for services rendered and to be rendered by deponent, as clerk, part due, and a part of said sum not due"; it was held defective, for uncertainty as to what was in fact due.[3] So, an affidavit in the following terms was held insufficient, on account of uncertainty: "A., plaintiff, states that B., the defendant, is *bonâ fide* indebted to him in the sum of $2,053.37 over and above all discounts, and the said A., at the same time, produces the account current which is hereunto annexed, by which the said B. is so indebted; and the said A. likewise states that he hath drawn on the said B. for the sum of $1,500, and also for the sum of $2,223.10, which drafts, though not due, the said A. understands from the said B., and verily believes, will not be paid, and further, that the latter draft for $2,223.10 hath never been accepted by the said B., and the said A. hath therefore allowed no credit or discount for said drafts. He further states that B. informed him some time ago, that he would be entitled to charge against said A.'s account, for some loss that he expected would accrue in the sale of certain flour on their joint account; no account has been exhibited stating the amount of such loss, and therefore he hath allowed said B., in stating his account, no credit."[4]

§ 105. Surplusage in an affidavit, not inconsistent with the substantial averment required by the statute, will not vitiate it.

[1] Bowen *v.* Slocum, 17 Wisconsin, 181.
[2] Jacoby *v.* Gogell, 5 Sergeant & Rawle, 450; Quarles *v.* Robinson, 1 Chandler, 29.
[3] Friedlander *v.* Myers, 2 Louisiana Annual, 920.
[4] Munroe *v.* Cocke, 2 Cranch C. C. 465.

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Thus, where the person making the affidavit stated sundry acts of the defendant, and closed with these words, — "affiant further saith he believes the facts above stated are true, and that said defendant is by the means above stated, concealing his effects so that the claims aforesaid will be defeated at the ordinary course of law"; which averment was in compliance with the law; it was held, that the unnecessary statements did not vitiate the affidavit.[1] So, where the affidavit stated that "the defendant resided out of the State of Louisiana, having acquired no legal residence in the State"; it was held, that the statement of the reason for considering him a non-resident, did not vitiate it.[2] But if the surplusage be of such character as substantially to impair the main allegation of the affidavit, the whole will thereby be vitiated.[3]

§ 106. All the elements of positiveness, knowledge, information, or belief, conjointly or separately, which the statute may require in the making of an affidavit, should therein appear, or be substantially included in its terms; or it will be bad. Thus, if a statute requires a fact to be sworn to in direct terms, it is not complied with by a party's swearing that he is "informed and believes" the fact to exist.[4] And under a statute authorizing an attachment "where there is good reason to believe" the existence of a particular fact, an affidavit that "it is the plaintiff's belief" that the fact existed, was held insufficient: he should have stated that he had good reason to believe and did believe it.[5] Under a law requiring the party to swear that a certain fact did not exist "within his knowledge or belief," an affidavit was held bad, which failed to state the want of his belief.[6] And so, where the party was required to swear "to the best of his knowledge and belief," and he swore only to the best of his belief.[7] And so, where he was required to swear that he "verily believes," and he swore "to the best of his knowledge and belief."[8]

[1] Spear *v.* King, 6 Smedes & Marshall, 276; Van Kirk *v.* Wilds, 11 Barbour, 520; Edwards *v.* Flatboat Blacksmith, 33 Mississippi, 190; Auter *v.* Steamboat J. Jacobs, 34 Ibid. 269.

[2] Farley *v.* Farior, 6 Louisiana Annual, 725.

[3] Emmett *v.* Yeigh, 12 Ohio State, 335.

[4] Deupree *v.* Eisenach, 9 Georgia, 598; *Ex parte* Haynes, 18 Wendell, 611; Cadwell *v.* Colgate, 7 Barbour, 253; Dyer *v.* Flint, 21 Illinois, 80; Archer *v.* Claflin, 31 Ibid. 306; Williams *v.* Martin, 1 Metcalfe (Ky.), 42; Wilson *v.* Arnold, 5 Michigan, 98.

[5] Stevenson *v.* Robbins, 5 Missouri, 18.

[6] Cobb *v.* Force, 6 Alabama, 468

[7] Bergh *v.* Jayne, 7 Martin, N. S. 609.

[8] Stadler *v.* Parmlee, 10 Iowa, 23.

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But where the affiant was required to state that the facts are within his personal knowledge, or that he is informed and believes them to be true, a positive oath of the facts was held sufficient, though he did not add that he had personal knowledge of them, or believed them to be true; it being considered that the positive oath implied both.[1] And so, under a statute requiring an affidavit "showing" the existence of a certain fact, it was held, that an affidavit of such fact, as the affiant "verily believed," was good; which was, in effect, to decide that the party's belief was a sufficient "showing," to fill the terms of the statute.[2]

§ 107. While it is in all cases advisable to follow the exact language of the statute, yet if the words of the affidavit are in substantial compliance with the terms of, or necessarily and properly imply the case provided for by, the statute, it will be sufficient.[3] Thus, where the law authorized an attachment when the debtor "is about to convey, assign, remove, or dispose of any of his property or effects, so as to defraud, hinder, or delay his creditors"; it was held, that an affidavit alleging that the defendant was "about to convey his property so as to hinder or delay his creditors," was equivalent to alleging fraud, and that therefore it was not necessary to use the word "defraud."[4] Where the cause for which an attachment might issue was, that "he resides out of this State," an affidavit that the defendant "is a non-resident," was considered sufficient.[5] Where the statute authorized an attachment upon an affidavit that the defendant is a "non-resident," an affidavit that he "is not now an inhabitant of this State" was sustained.[6] Where the language of the statute was, "that the debtor *so absconds* that the ordinary process of law cannot be served on him," an affidavit that the debtor *hath absconded* was considered as complying with the substantial requirements of the law.[7] An affidavit that the defendant "is about removing," was decided to be in conformity to the statute which provided for an attachment where the debtor "is removing."[8] Where the statute gave an attachment when the debtor "is removing or about to re-

[1] Jones *v.* Leake, 11 Smedes & Marshall, 591.
[2] Trew *v.* Gaskill, 10 Indiana, 265; McNamara *v.* Ellis, 14 Ibid. 516.
[3] Van Kirk *v.* Wilds, 11 Barbour, 520.
[4] Curtis *v.* Settle, 7 Missouri, 452.
[5] Graham *v.* Ruff, 8 Alabama, 171.
[6] Wiltse *v.* Stearns, 13 Iowa, 282.
[7] Wallis *v.* Wallace, 6 Howard (Mi.), 254.
[8] Lee *v.* Peters, 1 Smedes & Marshall, 503.

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move himself or his property beyond the limits of the State," and suit was brought against the owner and master of a steamboat, alleging that he was "about to remove the said steamboat beyond the limits of this State"; it was considered that, however defective the allegation might be, in stating the defendant to be about to remove only a single piece of property, yet that it was equivalent to stating that he was about to remove *himself*, since, as he was master of the boat, if he removed the boat, his relation to her necessarily involved his own removal.[1] Where the statute required the affidavit to state "that the defendant is about to remove himself and his effects so that the claim of the plaintiff will be defeated," a statement "that the defendant will remove himself and his effects beyond the limits of the State, before the plaintiff's claim could be collected by the ordinary course of law, and that he is transferring and conveying away his property, so that the claim of the plaintiff will be defeated, or cannot be made by the regular course of law," was held to be a substantial compliance with the law.[2] Where an affidavit stated that "A., B., and C., merchants and partners, trading and using the name and style of A. & Co., are justly indebted to the plaintiff in the sum of $5,460, and that the said A. & Co. reside out of this State"; and a motion was made to dismiss the attachment, because the affidavit did not state that the individuals constituting the firm of A. & Co. resided out of the State; the affidavit was held sufficiently certain, because when a partnership is spoken of by its partnership name, and said to reside or not to reside in a particular place, the meaning is presumed to be, that the members composing the partnership reside or do not reside in that place.[3] Where the statute required an oath that "the defendant is about to remove from the State, so that the ordinary process of law cannot be served on him," an affidavit that he is "about to abscond himself and his property out of the State, so that the process of law cannot be served on him," was considered as equivalent to the assertion that he is about to remove himself and property out of the State privately, and as substantially within the requirement of the statute.[4] Where the statute required the affidavit to state "the amount of the sum *due*," and the plaintiff swore that the defendant was

[1] Runyan *v.* Morgan, 7 Humphreys, 210.
[2] Dandridge *v.* Stevens, 12 Smedes & Marshall, 723.
[3] Chambers *v.* Sloan, 19 Georgia, 84.
[4] Ware *v.* Todd, 1 Alabama, 199.

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"really indebted" to him in a certain sum, it was held, that the expression conveyed the idea of a debt actually *due* and payable, and was sufficient.[1] Where, in enumerating the cases in which an attachment would lie, one was "when the debtor is about leaving permanently the State," and in a subsequent part of the same statute, in relation to the affidavit, the party was required to swear that "the debtor is on the eve of leaving the State forever"; it was held, that the latter requirement was fulfilled by an affidavit declaring that "the defendant was about leaving the State permanently."[2] Under a statute giving attachment "when a debtor is concealing or about removing his effects so that the claim of a creditor will be defeated," an affidavit that a debtor "is about removing from the State, or is so concealing his effects as to defeat the creditor's claim," was held sufficient.[3] Under a statute authorizing an attachment where the debtor "is about to remove his goods out of this State," an affidavit stating that the defendant "had removed part, and was about to remove the remainder of his goods and effects from this State," was considered as complying with the law.[4] Where an attachment might issue when "any person hath removed, or is removing himself out of the county privately, or so absconds or conceals himself, that the ordinary process of law cannot be served on him," an affidavit that the defendant "was removing himself out of the county privately," was held sufficient, without the addition of the words "so that the ordinary process of law cannot be served."[5] Under a statute using the phrase "absconding or concealing himself or his property or effects," an affidavit that the defendant "is concealing his property and effects," was adjudged sufficient.[6]

§ 108. Numerous cases of insufficient affidavits are reported. It is not without advantage to present them here. In doing so, as will be seen, no attempt is made at systematic arrangement, but they are given in the order they were met with. Under a statute authorizing attachment, where "the debtor is removing out of the county privately," an affidavit that he "intends to re-

[1] Parmele *v.* Johnston, 15 Louisiana, 429.
[2] Sawyer *v.* Arnold, 1 Louisiana Annual, 315.
[3] Commercial Bank *v.* Ullman, 10 Smedes & Marshall, 411.
[4] Mandel *v.* Peet, 18 Arkansas, 236.
[5] Bank of Alabama *v.* Berry, 2 Humphreys, 443.
[6] Boyd *v.* Buckingham, 10 Humphreys, 434.

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move" is not sufficient.[1] So, where an attachment was authorized when the debtor "absconds," and the affidavit was that he "has absconded."[2] So, where the statute stated the ground of attachment to be "that any person hath removed, or is removing himself out of the county privately"; and the affidavit was, that the defendant "is about to remove himself out of the county, so that the ordinary process of law cannot be served upon him."[3] So, where the ground of attachment was, that "the defendant is about to remove his property out of the State, and that thereby the plaintiff will probably lose the debt, or have to sue for it in another State"; and the affidavit set forth as the consequence of the alleged anticipated removal of the goods of the defendant, that "the ordinary process of law cannot be served on him."[4] So, where the statute gave an attachment when "the debtor is not resident in the State," and the affidavit was that the defendant "is not at this time within the State."[5] So, an affidavit "that the defendant has left the State never to return," does not comply with a statute requiring an averment that he is "about to remove his property out of the State."[6] A statute authorized an attachment upon an affidavit that "the debtor is either on the eve of leaving the State permanently, that he has left it never again to return, that he resides out of the State, or that he conceals himself in order to avoid being cited." An affidavit that the defendant "attempted to depart from the State permanently, and that he concealed himself so as to avoid being cited to appear and answer the demand of the plaintiff, and that he is about to remove his property out of the State," was considered insufficient; because, in regard to the departure and concealment, it referred indefinitely to the past, making no allusion either to the present or future, and was too vague to form the legal foundation of an attachment.[7] Under a statute authorizing attachment, "when any person shall be an inhabitant of any State, territory, or country, without the limits of this State, so that he cannot be personally served with process," an affidavit was held bad, which

[1] Mantz v. Hendley, 2 Hening & Munford, 308.
[2] Levy v. Millman, 7 Georgia, 167; Brown v. McCluskey, 26 Ibid. 577.
[3] Wallis v. Murphy, 2 Stewart, 15.
[4] Napper v. Noland, 9 Porter, 218.
[5] Croxall v. Hutchings, 7 Halsted, 84.
[6] Millaudon v. Foucher, 8 Louisiana, 582.
[7] New Orleans v. Garland, 11 Louisiana Annual, 438.

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averred the inhabitancy in another State, but omitted the averment as to the impossibility of personal service of process.[1] Under a statute authorizing an attachment, where the debtor "hath removed himself out of the county privately, so that the ordinary process of law cannot be served on him," an affidavit alleging the removal, but omitting the word "privately" was held bad.[2] An affidavit that the defendant "is about to abscond," was decided not to comply with a statute authorizing an attachment where the debtor "absconds or conceals himself"; or with one using the terms "shall be absconding or concealing himself,"[3] or with one using the phrase "hath absconded."[4] Where attachment was authorized when the debtor "is removing out of the county privately," an affidavit that he "hath removed" is bad.[5] Under a statute using the words "is privately removing out of the county, or absconds and conceals himself, so that the ordinary process of law cannot be served upon him," an affidavit that the defendant had "either left the county and commonwealth, or so absconds himself that the ordinary process of law cannot be served upon him," was held insufficient.[6] An affidavit that the defendant "was removing out of the county privately," was held insufficient, under a statute using the words "is removing out of the county privately, or absconds or conceals himself, so that the ordinary process of law cannot be served upon him."[7] Where the statute required the affidavit to state that the defendant "had not resided in the State for three months immediately preceding the time of making application for the attachment," and the affidavit was, that he "had not resided there for three months immediately preceding the date of the affidavit," and the affidavit was dated two days before the attachment was applied for; it was held insufficient.[8] In a proceeding against several defendants as non-residents, an affidavit stating that "they are not all residents" of the State in which the writ is sought, is indefinite and insufficient, as clearly implying that some of them do reside there.[9] Where the statutory ground of attachment was, that the defendant "is not a

[1] Thompson *v.* Chambers, 12 Smedes & Marshall, 488.
[2] M'Culloch *v.* Foster, 4 Yerger, 162.
[3] Bennett *v.* Avant, 2 Sneed, 152.
[4] Lewis *v.* Butler, Kentucky Decisions (Sneed), 290.
[5] Hopkins *v.* Suttles, Hardin, 95, note.
[6] Davis *v.* Edwards, Hardin, 342.
[7] Poage *v.* Poage, 3 Dana, 579.
[8] Drew *v.* Dequindre, 2 Douglass, 93.
[9] Powers *v.* Hurst, 3 Blackford, 229.

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resident of or residing within this State," an affidavit that he "is not a resident of this State, so that the process of this court cannot be served upon him," was held insufficient.[1] Under the same statute, an affidavit that the defendant "is not a resident of this State," was held bad.[2] Where the statute authorized an attachment where "a debtor is on the eve of leaving the State forever," an affidavit that the affiant "verily believes and has just grounds to apprehend that the defendant may depart from the State permanently," is insufficient.[3]

§ 109. The fact that *two* affidavits of the same import appear in the record, will not invalidate the attachment. The second will be disregarded.[4]

§ 110. In an action against two joint debtors, if the affidavit be insufficient as to one of them, it will not authorize an attachment against the property of both.[5]

§ 111. It is proper that an affidavit should be made as near as practicable at the time of the institution of the suit; but it is believed to be a general practice to allow attachments to issue on affidavits made some time before the issue of the writ. In South Carolina, where the law required the affidavit to be made at the time of filing the declaration, it was decided, that so constant and uniform had been the practice to the contrary, that it ought not to be contested or varied. "It will be seen at once," said the court, "that unless a party is present to make the affidavit at the filing of the declaration, a foreigner, or even one of our own countrymen, who should accidentally be absent from the State, might be deprived of the advantage accruing under the attachment act."[6] And in Missouri it was held, that the lapse of nine or ten days between the date of the affidavit and the issue of the writ, would not sustain a motion to quash. The affidavit alleged the non-residence of the defendant, and it was urged that the fact, though true when sworn to, may have ceased to be so when the writ was obtained;

[1] Lane *v.* Fellows, 1 Missouri, 251.
[2] Alexander *v.* Haden, 2 Missouri, 187.
[3] Reding *v.* Ridge, 41 Louisiana Annual, 36.
[4] Wharton *v.* Conger, 9 Smedes & Marshall, 510.
[5] Hamilton *v.* Knight, 1 Blackford, 25.
[6] Creagh *v.* Delane, 1 Nott & M'Cord, 189; Wright *v.* Ragland, 18 Texas, 289.

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but the court said, that if such were the case, it should be taken advantage of by plea in abatement, which would put in issue the truth of the affidavit at the time the writ issued.[1] In Michigan, however, under an act requiring the affidavit to state that the defendant "does not reside in this State, and has not resided therein for three months *immediately preceding the time of making application for such attachment*," it was held, that an affidavit made the day before the attachment issued, was bad;[2] and so of an affidavit under an act which used in that connection the words "immediately preceding the time of *making such affidavit*."[3] Under each act it was decided that the affidavit must be made on the same day that the attachment issues.

§ 112. The mode of defeating an attachment on account of defects in, or the omission to make, an affidavit, varies in different States. The most usual mode is by motion to quash or dissolve the attachment. This motion is in the nature of a plea in abatement, and, if successful, its effect is the same.[4] In Alabama and North Carolina, however, the only way to reach such defects is by plea in abatement.[5] Whichever mode is adopted, it should be resorted to *in limine;* for after appearance by the defendant and plea to the action, it is too late to take advantage of defects in the preliminary proceedings; they will be considered as waived, unless peculiar statutory provisions direct otherwise.[6] But it is held, that a defendant's appearance, by attorney, to move for the dismissal of an attachment, and to except to the jurisdiction of the court, is not such an appearance as may be construed into a submission to the jurisdiction.[7] But if a defendant appear, and deny the allegations of a defective affidavit, and treat it as if it were legal in its terms, and go into a trial of the issue made by himself as to the ground of the attachment, and thereby get all the

[1] Graham *v.* Bradbury, 7 Missouri, 281.

[2] Drew *v.* Dequindre, 2 Douglass, 93.

[3] Wilson *v.* Arnold, 5 Michigan, 98; Fessenden *v.* Hill, 6 Ibid. 242.

[4] Watson *v.* McAllister, 7 Martin, 368.

[5] Lowry *v.* Stowe, 7 Porter, 483; Jones *v.* Pope, 6 Alabama, 154; Burt *v.* Parish, 9 Ibid. 211; Kirkman *v.* Patton, 19 Ibid. 32; Garmon *v.* Barringer, 2 Devereux & Battle, 502.

[6] Garmon *v.* Barringer, 2 Devereux & Battle, 502; Stoney *v.* McNeill, Harper, 156; Watson *v.* McAllister, 7 Martin, 368; Enders *v.* Steamer Henry Clay, 8 Robinson (La.), 30; Symons *v.* Northern, 4 Jones, 241; Burt *v.* Parish, 9 Alabama, 211.

[7] Bonner *v.* Brown, 10 Louisiana Annual, 334; Johnson *v.* Buell, 26 Illinois, 66. *Sea contra,* Whiting *v.* Budd, 5 Missouri, 443; Evans *v.* King, 7 Ibid. 411.

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benefit that he could have had if the affidavit had been in strict conformity to law, and the result of the trial be adverse to him; he cannot obtain a reversal of the judgment because of the defect in the affidavit.[1]

§ 113. In the attachment laws of several States, provisions are found authorizing defective affidavits to be amended, and, in some instances, prohibiting the quashing or setting aside of an attachment on account of such defects, if a sufficient affidavit be filed. Similar provisions exist likewise as to attachment bonds. In regard to the latter it has been held, that a defect in the bond is not a sufficient cause for quashing the proceedings, unless an opportunity be given the plaintiff to execute a perfect bond, and he fail to do so.[2] The same rule is applied in the case of a defective affidavit.[3] The proper order to be made by the court in such cases is, that the attachment be quashed, unless the plaintiff, within a designated time, file a sufficient affidavit. A judgment dissolving the attachment *and* giving leave to amend, is inconsistent, and may be reversed.[4] Wherever an amended affidavit is filed, its allegations should relate to the time of the suing out of the attachment; for if they refer only to the existence of the ground for attachment at the time they are made, they will not sustain the attachment.[5]

If an affidavit be so defective as that the writ issued upon it is void, no amendment will be of any force to give validity to the writ, except as between the parties to the suit; it cannot cut off intermediate rights acquired by third persons in the property attached.[6]

[1] Ryan *v.* Bean, 2 Metcalfe (Ky.), 137.

[2] Planters & Merchants' Bank *v.* Andrews, 8 Porter, 404; Lowe *v.* Derrick, 9 Porter, 415; Tevis *v.* Hughes, 10 Missouri, 380; Scott *v.* Macy, 3 Alabama, 250.

[3] Bunn *v.* Pritchard, 6 Iowa, 56.

[4] Graves *v.* Cole, 1 G. Greene, 405.

[5] Crouch *v.* Crouch, 9 Iowa, 269; Wadsworth *v.* Cheeny, 10 Ibid. 257.

[6] Whitney *v.* Brunette, 15 Wisconsin, 61.

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CHAPTER VI.

ATTACHMENT BONDS.

§ 114. In many of the States it is required, that a plaintiff, before obtaining an attachment, shall execute a bond, with security, for the indemnification of the defendant against damage by reason of the attachment. The terms of such instruments vary, but that is their usual scope. Sometimes, in order to protect defendants who do not appear to the action, a clause is added in the condition, that the plaintiff shall refund to the defendant any money recovered by means of the attachment, which was not justly due to him. This is merely giving, at the institution of the suit, what, by the custom of London, the plaintiff is required to give at its termination, in order to obtain execution against the garnishee.

§ 115. Where the statute requires a bond to be given before the attachment issues, a failure to give it is fatal to the suit, unless the law authorize the defect to be cured; and the omission may be taken advantage of by the defendant, either upon a motion to dismiss, or in abatement.[1] Great strictness has been manifested on this point, and without doubt very properly; for if the officer "could dispense with the requisites of the law, for a part of a day, why might he not for a whole day, or many days, and at last the whole be excused by the answer that the defendant was still secured, and might make the plaintiff responsible, who might be amply able to discharge the damages recovered, although no bond was executed at all?"[2]

§ 116. In Mississippi, the statute declares that an attachment issued without bond is void, and shall be dismissed; and the courts of that State have carried out the law rigidly; holding that the attachment is absolutely void;[3] that the want of a suf-

[1] Bank of Alabama v. Fitzpatrick, 4 Humphreys, 311; Didier v. Galloway, 3 Arkansas, 501; Davis v. Marshall, 14 Barbour, 96; Benedict v. Bray, 2 California, 251; Kellogg v. Miller, 6 Arkansas, 468; Lewis v. Butler, Kentucky Decisions (Sneed), 290; Stevenson v. Robbins, 5 Missouri, 18.

[2] Hucheson v. Ross, 2 A. K. Marshall, 349.

[3] Ford v. Hurd, 4 Smedes & Marshall, 683.

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ficient bond cannot be cured by filing a proper one after the suit is brought;[1] that the absence of a bond is not remedied by the appearance of the defendant and his pleading to the action;[2] and that a judgment against a garnishee who has answered under an attachment issued without bond is void,[3] and no bar to a subsequent action against him by the attachment defendant for the same debt.[4] In Kentucky, where the bond was required to be in double the sum to be attached, and the statute declared that every attachment issued without such bond being taken should be illegal and void, the strict rule was applied, in cases where the bond was below the required amount; and the attachment was, on writ of error by the defendant, declared void.[5] In South Carolina, however, so great strictness does not prevail. There the statute declares the attachment void when issued without bond; but the courts have construed the law to mean voidable only, and held that the attachment is good until declared void on pleading.[6]

§ 117. But though an attachment sued out without sufficient bond having been taken, should be considered absolutely void as to the defendant, yet it will, unless the defect appear on the face of the writ, justify an officer in making a levy under it. It was so held in Kentucky, where, as stated in the last section, the court, on writ of error by the defendant, held the attachment void in such case.[7] This doctrine is certainly correct, as thus applied, but would not be, if the law required the writ to state that a bond was given, and it did not state it.

§ 118. But though an officer executing the writ is, under such circumstances, not liable as a trespasser, yet the party who causes the writ to issue without giving bond, and the officer who issues it, are both so liable to the defendant.[8]

§ 119. As in the case of the affidavit, the bond must appear in the record of the action;[9] but, unless required by statute, the

[1] Houston v. Belcher, 12 Smedes & Marshall, 514.
[2] Tyson v. Hamer, 2 Howard (Mi.), 669.
[3] Ford v. Woodward, 2 Smedes & Marshall, 260.
[4] Ford v. Hurd, 4 Smedes & Marshall, 683.
[5] Martin v. Thompson, 3 Bibb, 252; Samuel v. Brite, 3 A. K. Marshall, 317.
[6] Camberford v. Hall, 3 M'Cord, 345.
[7] Banta v. Reynolds, 3 B. Monroe, 80; Owens v. Starr, 2 Littell, 230.
[8] Barkeloo v. Randall, 4 Blackford, 476. [9] Cousins v. Brashear, 1 Blackford, 85.

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omission to recite in the writ that a bond was given, will not vitiate the attachment.[1]

§ 120. When it is required that a bond shall be approved by a clerk of court, it is not necessary for him to indorse his approval thereon: that is but evidence of the fact, which may be otherwise proved.[2] If he receives and files the bond, he is estopped from afterwards denying that he approved it.[3] And his approval is but *primâ facie* evidence of the sufficiency of the sureties, subject to be overthrown.[4]

§ 121. The bond must be *actually executed and delivered* before the writ issues. It will not answer for the party to prepare what may be made into the required instrument, and leave it incomplete. Therefore, where it appeared that the plaintiff, before the writ issued, filed with the clerk a half sheet of paper, upon which he and another person had signed their names, but that the paper was otherwise blank, it was decided that, as the ceremonies necessary to a bond consist of *writing* (on paper or parchment), *sealing*, and *delivery*, none of which existed in this case, there was no bond; and the writ was quashed.[5]

§ 121 *a*. When a bond is executed by the plaintiff, and delivered to the officer who is to issue the attachment, no agreement between them as to any condition subsequent, upon which the bond was to become unavailable in the case, can have any effect upon the right of the attachment defendant to recover thereon. Thus, where the plaintiff, at the time of obtaining an attachment, executed a bond and left it with the officer, with the condition and agreement that the officer might use it as the basis of an attachment in case the plaintiff failed to produce a decision of the Supreme Court that such bond was unnecessary; and that it was not to be so used unless the plaintiff so failed; and within twenty-four hours thereafter the officer issued the attachment; and afterwards the plaintiff produced to him a decision of the Supreme Court to the effect stipulated; whereupon the officer delivered the bond up to the

[1] Hays *v.* Gorby, 3 Iowa, 203; Ellsworth *v.* Moore, 5 Ibid. 486.
[2] Mandel *v.* Peet, 18 Arkansas, 236; Griffith *v.* Robinson, 19 Texas, 219.
[3] Pearson *v.* Gayle, 11 Alabama, 278.
[4] Blaney *v.* Findley, 2 Blackford, 338.
[5] Boyd *v.* Boyd, 2 Nott & M'Cord, 125; Perminter *v.* M'Daniel, 1 Hill (S. C.), 26.

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plaintiff, who destroyed it; and afterwards the attachment defendant sued upon it; it was held, that the defendant's right of action upon it was not affected by the agreement between the plaintiff and the officer.[1]

§ 122. If the bond be actually executed, according to the statutory requirement, but before it is returned into court, be accidentally destroyed, the failure to return it will not be a cause for quashing the attachment, though the statute require it to be returned.[2] Nor will the failure of the officer taking the bond, to return it into court, authorize the attachment to be dissolved, if no blame be chargeable to the plaintiff.[3]

§ 123. If it appear from the recitals in the bond, that it was not executed until after the writ issued, it will be fatal to the attachment, where its execution, as is usually the case, is a condition precedent to the issue of the writ. Therefore, where the attachment and bond bore date on the same day, and the bond recited that on that day the plaintiff *had first* issued or obtained the attachment, the attachment was quashed.[4] But where, under similar circumstances, and similar statutory requirements, the bond recited that the plaintiffs "*have* this day sued out an attachment," it was held, on a motion to quash, that though the issue of the writ before the giving of the bond would be fatal, yet that the recital of the bond was not evidence of the fact. "The recital," say the court, "was evidently intended to identify the case in which the bond was given, and not to indicate its order, in point of time, in the proceedings. Nothing more was meant, or is necessarily to be inferred from it, than that it was intended as the bond required to be given in the case, wherein the plaintiffs had instituted proceedings, by filing their petition and making affidavit for the purpose of suing out an attachment; not that the writ had actually been issued by the clerk already. That is not a necessary, nor, when it is considered that it would have involved the violation of duty by the clerk, is it a probable conclusion."[5] And so,

[1] Bennett *v.* Brown, 20 New York, 99.
[2] Wheeler *v.* Slavens, 13 Smedes & Marshall, 623.
[3] Bank of Augusta *v.* Conrey, 28 Mississippi, 667; State Bank *v.* Hinton, 1 Devereux, 397.
[4] Hucheson *v.* Ross, 2 A. K. Marshall, 349; Root *v.* Monroe, 5 Blackford, 594.
[5] Wright *v.* Ragland, 18 Texas, 289.

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where the condition of the bond required the plaintiff to prosecute to effect an attachment "granted," and the bond and the attachment were of the same date, the court considered it unnecessary to set forth in the bond that it was taken before granting the writ, and that it would be presumed the law had been complied with. "The object of the law," said the court, "was to prevent an attachment from being issued without giving the defendant the security afforded by the bond, and the least possible division of time is a sufficient priority. If the law has been substantially fulfilled, the court will not permit the object to be defeated, because the phraseology of some part of the proceedings may not be critically correct."[1]

But though the recital of a bond should indicate that the attachment had been previously obtained, it will not be sufficient to quash the writ, if it appear on inspection of the record that the writ was in fact subsequently issued. This, however, could not be shown by parol evidence.[2]

§ 124. The sufficiency of the bond to sustain the attachment may be questioned, either as to its terms, parties, or amount. If there be a bond, but not such as the law requires, it will be the same as if there were no bond, unless an amendment of it be authorized by statute.[3] A substantial compliance with the statute, however, seems to be in general sufficient.[4] But whatever objections the defendant may have to the bond should be presented before he pleads to the merits; unless the law authorize a new bond to be required, where the surety becomes insolvent after its execution. In that case, the fact may be shown after pleading to the merits.[5]

§ 125. *As to the Terms of the Bond.* Where the statute requires a bond in a stated penalty, with a specified condition, its requirement is not met by the execution of a covenant, by which the plaintiff and his security promise to pay to the defendant the amount of the penalty stated in the statute, *or* all damages and

[1] McKenzie *v.* Buchan, 1 Nott & M'Cord, 205.

[2] Summers *v.* Glancey, 3 Blackford, 361; Reed *v.* Bank of Kentucky, 5 Ibid. 227.

[3] Bank of Alabama *v.* Fitzpatrick, 4 Humphreys, 311; Houston *v.* Belcher, 12 Smedes & Marshall, 514.

[4] O'Neal *v.* Owens, 1 Haywood (N. C.), 362; Leach *v.* Thomas, 2 Nott & M'Cord, 110

[5] Ealer *v.* McAllister, 14 Louisiana Annual, 821.

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costs he may sustain by reason of the issue of the attachment.[1] And if such an instrument be declared on as a bond with a condition, and a breach thereof be assigned, when it is produced on the trial the variance will be fatal.[2]

§ 126. When a statute in one clause provides what shall be the condition of the bond, and in another, sets forth the *form* of the condition, the proper course is to follow the form, without regard to whether its terms coincide with the language of the statute elsewhere.[3] Indeed, it has been decided, that if the bond follow the language of the statute instead of the form prescribed, when they are variant from each other, it will be void.[4]

§ 127. To state in the bond that the suit is brought in a court other than that in which it is brought, is a fatal error;[5] as is likewise an omission to name the court;[6] but a misrecital in a bond of the term of the court to which the attachment is returnable, does not vitiate it: the affidavit and the writ control the terms of the instrument.[7] But where the bond recited the time when the court was to be held, as "the first Monday in June," without designating it as the *next county court*, it was considered defective, but amendable.[8] And so, where the bond was dated on the 4th day of January, 1836, and recited the attachment as returnable "to the county court to be held on the third Monday of January, instant," while the attachment bore date the 4th of January, 1838, the bond was held to be defective.[9]

§ 128. It is no objection to a bond that it is not dated, where a date is not required by statute to be named in it.[10]

§ 129. An insufficient description of the parties, or the suit, will vitiate the bond. Thus, where the obligors acknowledge

[1] Homan *v.* Brinckerhoff, 1 Denio, 184.
[2] Rochefeller *v.* Hoysradt, 2 Hill (N. Y.), 616.
[3] Love *v.* Fairfield, 10 Illinois (5 Gilman), 303; Lucky *v.* Miller, 8 Yerger, 90.
[4] McIntyre *v.* White, 5 Howard (Mi.), 298; Amos *v.* Allnutt, 2 Smedes & Marshall, 215; Proskey *v.* West, 8 Ibid. 711.
[5] Bonner *v.* Brown, 10 Louisiana Annual, 334.
[6] Lawrence *v.* Yeatman, 3 Illinois (2 Scammon), 15.
[7] Houston *v.* Belcher, 12 Smedes & Marshall, 514.
[8] P. & M. Bank *v.* Andrews, 8 Porter, 404.
[9] Lowry *v.* Stowe 7 Porter, 483 [10] Plumpton *v.* Cook, 2 A. K. Marshall, 450.

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themselves bound, "conditioned that A. B. plaintiff in attachment against —— defendant will prosecute," &c., it was held, that the attachment could not be sustained.[1]

§ 130. While any substantial departure from a prescribed form, or omission from the instrument of terms required by the statute, will be fatal to the action, unless remediable by amendment, the addition of terms not required will not have that effect. Thus, where a bond contained all the requisite conditions, with the further one, "that the plaintiff shall prosecute his attachment with effect at the court to which it is returnable"; it was held, that this did not authorize the attachment to be dismissed.[2] So, where, by statute, the bond was required to be made to the State of Arkansas, and a bond was made to that State, "for the use and benefit of the defendant," it was held, that the words added were merely surplusage, and did not affect the validity of the bond.[3]

§ 131. *As to the Parties to the Bond.* If it be required that the bond be given by the plaintiff, and no provision exist for its being given by any other person, a bond executed by a stranger to the suit will be invalid. This was so held, where the statute declared that no writ of attachment should issue "before the plaintiff has given bond";[4] and also under a statute requiring bond to be taken of "the party for whom the attachment issued."[5] This rule, however, is to be applied within its reason, and not arbitrarily and literally, without regard to circumstances. Therefore, where bond was required to be taken from "the party plaintiff," it was held, that a bond executed by one to whose use the suit was brought, was within the meaning of the statute.[6] And so, under a statute which provided that "the creditor shall likewise file with the clerk a bond to the defendant with sufficient security," a bond was signed in the plaintiff's name, by an agent having no authority therefor, and by competent sureties; and it was held sufficient, though not the act of the plaintiff, because the reason of the law was satisfied by the sufficiency of the security.[7]

[1] Schrimpf *v.* McArdle, 13 Texas, 368. [2] Kahn *v.* Herman, 3 Georgia, 266.
[3] Steamboat Napoleon *v.* Etter, 6 Arkansas, 103.
[4] Myers *v.* Lewis, 1 McMullan, 54.
[5] Mantz *v.* Hendley, 2 Hening & Munford, 308.
[6] Grand Gulf R. R. & B. Co. *v.* Conger, 9 Smedes & Marshall, 505; Murray *v.* Cone, 8 Porter, 250.
[7] Taylor *v.* Ricards, 9 Arkansas, 378.

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Under a statute requiring a bond to be taken of "the party for whom the attachment issued," it was considered, in a suit by a mercantile firm, that a bond entered into by one of the firm in his own name, was sufficient, where it appeared in the instrument that he executed it as one of the firm, and sufficiently described the suit as being by, and for the benefit of, the firm.[1] But where the bond recited that the individual partner had sued out the attachment, and was conditioned that if *he* should be cast in the suit, *he* should pay all costs and damages recovered against *him* for suing out the writ, it was decided that the bond was not in compliance with the statute, and the attachment was therefore quashed.[2]

So, where an attorney at law, under the same statute, executed the bond in his own name, conditioned that *he* should pay and satisfy all costs which should be awarded to the defendant, in case *he* should be cast, &c.; it was held, that the bond was bad, and the attachment was set aside.[3]

§ 132. Though the plaintiff is usually required to execute the bond, yet as that might often be impracticable, it is generally provided that it may be done by his agent, attorney, or other person. In such case the word *attorney* in the statute will be considered to include an attorney at law, as well as an attorney in fact;[4] and it is held, that one acting in the former capacity, in the collection of a debt in a State where he is authorized to practise law, may, as an incident of his employment, execute the bond in the name of his client. In the language of the Supreme Court of Louisiana,—"The signing of the bond is an act of administration alone, indispensable to secure the rights of the client, and is fully conferred by the mandate in general terms. The mandate is to collect his debt by process of law. If no agent or attorney in fact is constituted, the attorney at law is the mandatary for this purpose. The signing of the attachment bond is a necessary incident to the collection of the debt, and is embraced in the general power to make the collection."[5] But the same court refused to extend this doc-

[1] Kyle *v.* Connelly, 3 Leigh, 719; Wallis *v.* Wallace, 6 Howard (Mi.), 254.
[2] Jones *v.* Anderson, 7 Leigh, 308.
[3] Mantz *v.* Hendley, 2 Hening & Munford, 308.
[4] Trowbridge *v.* Weir, 6 Louisiana Annual, 706.
[5] Wetmore *v.* Daffin, 5 Louisiana Annual, 496.

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trine to the case of an attorney at law from another state, who was not licensed to practise in the courts of Louisiana.[1]

Under statutes of similar import, it is held, that a bond signed by one, as principal, styling himself agent of the plaintiff, is a compliance with the statute;[2] and this view was taken also in cases where he did not so style himself, but signed the bond simply in his personal capacity.[3]

§ 133. Where the bond purports to be the act of the plaintiff, by an attorney in fact, the court will not hold the bond to be a nullity because no power of attorney under seal is produced;[4] but the authority of the attorney will be presumed, on the hearing of a motion to quash the writ on account of the insufficiency of the bond. If it be intended to question the authority, it must be done by plea to that effect;[5] for the agent's authority is a matter of evidence *aliunde*, and forms no part of the bond; and on a motion to quash or dismiss, the court will not inquire into the fact of agency, but will presume it.[6] The utmost extent to which the court would go in such a case, would be to rule the party to produce, within a reasonable time, the power of attorney under which he acted.[7]

In cases of this description, it is held, that showing the agent to have had no authority to execute the bond, is no ground, of itself, for abating the action; but that, shown in connection with the further fact, that the agent had no authority for instituting the suit, and that the suit is not prosecuted with the authority or consent of the plaintiff, it would be.[8]

§ 134. Whether a subsequent ratification by the plaintiff, of an unauthorized act of a party in signing his name to the bond, will remedy the defect, has been differently decided. In Louisiana, it

[1] Wetmore *v.* Daffin, 5 Louisiana Annual, 496.

[2] Dillon *v.* Watkins, 2 Speers, 445; Walbridge *v.* Spalding, 1 Douglass, 451.

[3] Frost *v.* Cook, 7 Howard (Mi.), 357; Page *v.* Ford, 2 Smedes & Marshall, 266; Clanton *v.* Laird, 12 Ibid. 568.

[4] Wood *v.* Squires, 28 Missouri, 528.

[5] Alford *v.* Johnson, 9 Porter, 320; Messner *v.* Hutchins, 17 Texas, 597; Wright *v.* Smith, 19 Ibid. 297.

[6] Lindner *v.* Aaron, 5 Howard (Mi.), 581; Spear *v.* King, 6 Smedes & Marshall, 276; Jackson *v.* Stanley, 2 Alabama, 326; Goddard *v.* Cunningham, 6 Iowa, 400; Wright *v.* Smith, 19 Texas, 297; Messner *v.* Lewis, 20 Ibid. 221.

[7] Lindner *v.* Aaron, 5 Howard (Mi.), 581.

[8] Dove *v.* Martin, 23 Mississippi, 588.

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is held in the negative.[1] But in the case from Mississippi, cited in the last section,[2] it will be observed, that, to defeat the action on account of want of authority in the agent, it must be shown, likewise, that he had no authority for instituting the suit, and that the suit is not prosecuted with the authority or consent of the plaintiff. Afterwards, in the same State, it was expressly decided, that if the plaintiff appear and prosecute the action, it will be considered a recognition of the agent's authority, so as to sustain the suit.[3] And in Arkansas it was decided, that a subsequent ratification by the plaintiff will sustain the bond, and that a plea in abatement alleging want of authority in the agent, is insufficient, unless it exclude the conclusion that a ratification has taken place.[4] And in Texas it was held, that if the suit should be abated because the agent had no authority, the plaintiff will, nevertheless, be liable on the bond, if the agent acted at his instance, and was afterwards sustained by him in the prosecution of the suit.[5]

§ 134 *a*. If the statute require a bond to be given "with sureties," but without designating how many, will a bond with one surety be sufficient? This question came up in Iowa, where it was held, that the attachment could not be quashed because there was only one surety in the bond. The court called to its aid a provision of the Code of that State, that "words importing the singular number only may be extended to several persons or things, and words importing the plural number only may be applied to one person or thing"; and held, that, as the object of the law is to afford indemnity to the defendant for the wrongful suing out of the attachment; and as this may be, and often is, as effectually done by one as by a half-dozen securities; and as it was the business of the clerk who took the bond to see that the surety was sufficient; the law was in effect complied with by the presentation of one surety.[6]

§ 135. Where the law required the sureties in the bond to be residents of the State, it was considered unnecessary to state in the instrument that they were so: the fact would be presumed.[7]

[1] Grove *v.* Harvey, 12 Robinson (La.), 221.
[2] Dove *v.* Martin, 23 Mississippi, 588.
[3] Bank of Augusta *v.* Conrey, 28 Mississippi, 667.
[4] Mandel *v.* Peet, 18 Arkansas, 236.
[5] Peiser *v.* Cushman, 13 Texas, 390.
[6] Elliott *v.* Stevens, 10 Iowa, 418.
[7] Jackson *v.* Stanley, 2 Alabama, 326.

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§ 136. It is no objection to a bond taken in a suit by a copartnership, that the partnership name was signed to it by one of the firm, instead of the individual names of the several partners. If not binding on all the partners, it is on him who signed it.[1] And where the undertaking was not under seal, and the plaintiffs were a partnership, and the sureties were also, and they signed in their respective partnership names, it was held that the undertaking was sufficient.[2]

§ 137. The statutes of the different States vary, as to who shall be named as obligee in the bond. In some States, it is the defendant; in others, the bond is payable to the State, with statutory provision for suit on it in the name of the State, to the use of the party injured. In the latter case, it could not well be that any mistake should be made in naming the obligee; but otherwise in the former; and it is important to avoid errors on this point, as they would, if made in a material particular, be fatal to the attachment. Thus, where an attachment was issued against a firm by its copartnership name, and the bond was given to two persons as individuals, who, though of the same surnames as those constituting the firm, were yet not described in the bond as being the partners of the house; it was held, that the statute requiring the bond to be "payable to the defendant" was not complied with, and the attachment was quashed.[3]

§ 138. *As to the Amount of the Bond.* This is in all cases regulated by statute; and the importance of correctness in this respect is so manifest, and the means of exactness so simple, that few questions have arisen in reference to it.

§ 139. It is no objection that the bond is in a greater sum than is required by law;[4] but if it be less it will be fatal, unless amendable.[5]

§ 140. In South Carolina, where the statute requires the bond

[1] Thatcher *v.* Goff, 13 Louisiana, 360.

[2] Danforth *v.* Carter, 1 Iowa, 546; Churchill *v.* Fulliam, 8 Ibid. 45.

[3] Birdsong *v.* McLaren, 8 Georgia, 521.

[4] Fellows *v.* Miller, 8 Blackford, 231; Shockley *v.* Davis, 17 Georgia, 175; Bourne *v.* Hocker, 11 B. Monroe, 21.

[5] Williams *v.* Barrow, 3 Louisiana, 57; Martin *v.* Thompson, 3 Bibb, 252; Samuel *v.* Brite, 3 A. K. Marshall, 317; Marnine *v.* Murphy, 8 Indiana, 272.

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to be in double the amount *sued for*, it is held, that if the action be assumpsit, the bond must be in double the sum stated in the writ; if debt, and the damages stated in the writ are merely nominal, the debt is the sum sued for, and the criterion of the amount of the bond; but if the damages are laid to cover the interest which may be due, then the debt and damages are the sum sued for, and the bond must be in double that sum.[1] In that State the attachment is obtained, without a statement under oath of the amount actually sued for, and there is, therefore, nothing by which that amount can be fixed, except the sum claimed in the writ.[2]

§ 141. In Louisiana, where, under their system of practice, the actual sum claimed by the plaintiff must be stated in the petition on which the suit is founded, the following case arose, under a law which required the bond to be "in a sum exceeding by one half that claimed by the plaintiff." The plaintiff, in order to obtain the attachment, swore that the sum of $2,350, besides interest, damages, &c., was due to him. Afterwards, on filing his petition, setting forth his cause of action, he claimed a greater amount, which resulted from an allegation of damages, and a fixation of the rate of interest; and it was held, that his claiming in his petition a greater amount than in his affidavit, did not invalidate the attachment, and that the bond being in a larger sum by one half than that named in the affidavit, was sufficient, though it was not in a larger sum by one half than that claimed in the petition.[3]

But where the plaintiff claimed in his affidavit a certain sum, with interest at a designated rate, from a given date, and the bond did not exceed, by one half, the amount due, principal and interest, it was held to be fatal to the attachment. This case was distinguished from that just cited, "because in that case the affidavit stated a certain sum as due, 'besides interest, damages, etc.' The bond was properly proportioned to the sum named, and it was considered that the words 'interest, damages, etc.,' were to be disregarded, because neither the rate of interest, nor the time for

[1] Young *v.* Grey, Harper, 38; Callender *v.* Duncan, 2 Bailey, 454; Brown *v.* Whiteford, 4 Richardson, 327.

[2] Brown *v.* Whiteford, 4 Richardson, 327.

[3] Pope *v.* Hunter, 13 Louisiana, 306; Jackson *v.* Warwick, 17 Ibid. 436; Saulter *v.* Butler, 10 Georgia, 510.

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which it ran, was stated."[1] But afterwards the same court, in again affirming their first position, that the claiming in the petition of a greater sum than that sworn to, was not a cause for dissolving the attachment, yet held that the judgment could not be given, with privilege, for a greater amount than that named in the affidavit, nor would the plaintiff be justified in holding, under a levy, a greater amount of property than was necessary to cover that sum and costs.[2] And this defect in the amount of the bond cannot be cured by filing an additional bond, sufficient in amount to cover the additional amount claimed.[3]

§ 142. Where the law required the bond to be in double the sum *sworn to*, a misrecital in the bond of the amount sworn to, whereby it appeared that the bond was not in double that sum, but less, was held not to vitiate the bond, as the affidavit controlled, in ascertaining the true sum.[4]

§ 143. In all these cases of defective or insufficient bond, the defendant is usually the only party who can take advantage of the defect. A subsequent attaching creditor cannot be allowed to become a party to the suit, so as to take advantage of a defect in the bond, in order that his attachment may take the property.[5]

§ 144. As to the time when advantage should be taken by the defendant of defects in the bond, for the purpose of defeating the attachment, the rule laid down as to affidavits may be considered applicable, that the exception must be taken *in limine*.[6] In Mississippi, as we have seen,[7] the defect is not cured by appearance and plea; but it is nowhere else so held, and in South Carolina the reverse is the rule.[8] It follows that the objection comes al-

[1] Planters' Bank *v.* Byrne, 3 Louisiana Annual, 687; Graham *v.* Burckhalter, 2 Ibid. 415.

[2] Fellows *v.* Dickens, 5 Louisiana Annual, 131.

[3] Graham *v.* Burckhalter, 2 Louisiana Annual, 415.

[4] Lawrence *v.* Featherston, 10 Smedes & Marshall, 345.

[5] Camberford *v.* Hall, 3 M'Cord, 345; M'Kenzie *v.* Buchan, 1 Nott & M'Cord, 205; Wigfall *v.* Byne, 1 Richardson, 412; Van Arsdale *v.* Krum, 9 Missouri, 397.

[6] Garmon *v.* Barringer, 2 Devereux & Battle, 502; Stoney *v.* M'Neill, Harper, 156; Watson *v.* M'Allister, 7 Martin, 368; Enders *v.* Steamer Henry Clay, 8 Robinson (La.), 30; Voorhees *v.* Hoagland, 6 Blackford, 232; Beecher *v.* James, 3 Illinois (2 Scammon), 462.

[7] Ante, § 116.

[8] Young *v.* Grey, Harper, 38.

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together too late in an appellate court, particularly when it was not made in the court below.[1] A defendant's appearance, by attorney, however, to move for the dismissal of an attachment and to except to the jurisdiction of the court over him, is held not to be such an appearance as will be construed into a submission to the jurisdiction.[2]

§ 145. The extent to which courts may make requirements upon parties in regard to bonds, must depend entirely upon statutory authority, except as to those matters which are apparent on the face of the proceedings. If a bond, legal in its terms, parties, and amount, be given at the institution of the suit, and accepted by the proper officer, the court will not, without some statutory authority, look into any alleged want of sufficiency in the parties. Thus, if the sureties were insolvent when they signed the bond, or have since become so, the court will not sustain a motion to require additional security; because its power in such cases depends wholly upon the terms of the statute.[3]

§ 146. There is no power in a court, except as conferred by law, to allow an amendment of an insufficient bond;[4] but this authority is now given in several States. In Missouri, under a statute which authorized the court to "order another bond to be given," where that given "is insufficient, or any security therein has died, or removed from the State, or has become, or is likely to become, insolvent," a bond was given, which was defective in the omission of a material clause in the condition, and leave was given the plaintiff to file an amended bond. It was contended that such an amendment was not contemplated by the statute, but that the insufficiency must be for the reason, either, that the security had died, or removed from the State, or had become, or was likely to become, insolvent; but it was held, that if such was the intention of the legislature, the words "that the bond given by the plaintiff is insufficient" might as well have been omitted; and that the court rightly permitted the bond to be amended.[5]

[1] Conklin *v.* Harris, 5 Alabama, 213; Fleming *v.* Burge, 6 Ibid. 373; Burt *v.* Parish, 9 Ibid. 211; Bretney *v.* Jones, 1 G. Greene, 366; Miere *v.* Brush, 4 Illinois (3 Scammon), 21; Morris *v.* Trustees, 15 Ibid. 266; Kritzer *v.* Smith, 21 Missouri, 296.

[2] Bonner *v.* Brown, 10 Louisiana Annual, 334.

[3] Proskey *v.* West, 8 Smedes & Marshall, 711.

[4] Roulhac *v.* Rigby, 7 Florida, 336. [5] Van Arsdale *v.* Krum, 9 Missouri, 397.

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§ 147. Under a statute which provided that "the plaintiff before or during the trial, should be permitted to amend any defects of form in the original papers," it was held, that a defective bond might be amended by the substitution of a new and perfect one;[1] and that a defect in the bond would not be a sufficient cause for quashing the proceedings, unless an opportunity were given to the plaintiff to execute a perfect bond, and he declined doing so.[2]

§ 148. Where this right to amend is given, it makes no difference whether the bond be void or only defective: in either case it is the duty of the court to permit the plaintiff to substitute a sufficient bond.[3] But the application to amend must contemplate the removal of all the objections to the bond, or the refusal to allow the amendment will not be error. Therefore, where the bond was without seals to the names of the principal and surety, and the principal asked leave to affix a seal to his own name, which was refused, and the attachment quashed for want of sufficient bond; it was held not to be error, because, if the seal had been affixed to his name, the bond would still have been insufficient, from the want of a seal to that of the surety.[4]

§ 148 *a*. When a plaintiff has obtained leave to file an amended bond, and has done so, it is substituted for that originally given, and has the effect of sustaining the attachment from the commencement of the action, and is to be treated as the defendant's security from that time.[5]

§ 149. Where the plaintiff needs the testimony of a surety in his bond, he will be allowed, if no liability on the bond has already accrued, to substitute a new surety.[6]

§ 150. The errors and defects of attachment bonds, however they might affect the attachment suit, do not impair the liability of the obligors to the defendant. Upon them the obligation con-

[1] Lowry *v.* Stowe, 7 Porter, 483.

[2] P. & M. Bank *v.* Andrews, 8 Porter, 404; Lowe *v.* Derrick, 9 Ibid. 415; Tevis *v.* Hughes, 10 Missouri, 380; Scott *v.* Macy, 3 Alabama, 250; Lea *v.* Vail, 3 Illinois (2 Scammon), 473; Wood *v.* Squires, 28 Missouri, 528; Beardslee *v.* Morgan, 29 Ibid. 471; Henderson *v.* Drace, 30 Ibid. 358.

[3] Jackson *v.* Stanley, 2 Alabama, 326; Conklin *v.* Harris, 5 Ibid. 213.

[4] Hunter *v.* Ladd, 2 Illinois (1 Scammon), 551.

[5] Branch of State Bank *v.* Morris, 13 Iowa, 136.

[6] Tyson *v.* Lansing, 10 Louisiana, 444.

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tinues, though the attachment might have been quashed because of the insufficiency of the instrument, either as to amount, terms, or the time of its execution. Thus, though a bond be not taken until after the writ is issued, — which we have seen is a proper ground for quashing the writ, —[1] the obligors cannot set up that fact as a defence to an action on the instrument.[2] But if it be not given till after the suit is dismissed, it is wholly void.[3] And the omission from a bond of a part of the condition required by the statute, does not invalidate it as against the obligors, but, to the extent it goes, it is valid.[4]

§ 151. Where a bond is executed without being required or authorized by any statute, the makers cannot defend against it on that ground: it is good as a common law bond. This was ruled in an action on a bond, given by a plaintiff on commencing a suit by attachment in a Circuit Court of the United States, and the bond was made to the United States. No law of the United States requiring it, and not being executed in connection with any business of, or any duty of the obligors to, the government, it was contended that it could not be enforced; but the court determined otherwise.[5]

§ 152. The bond is not confined, in its obligation, to the proceedings in the court in which the attachment suit was instituted, but extends on to the final determination of the cause. Where the condition was "to pay the defendant all damages and costs which he may sustain by reason of the issuing of the attachment, if the plaintiff fail to recover judgment thereon," the plaintiff recovered judgment in the court in which the suit was brought, and the defendant appealed therefrom, and in the appellate court the judgment was reversed. When sued on the bond, the obligor urged that the condition was not broken, inasmuch as he had recovered judgment in the attachment suit; but this view was not sustained; the court considering that the bond was not restricted to the court in which the attachment was obtained, but extended to the final result of the case.[6]

[1] Ante, § 121.
[2] Sumpter *v.* Wilson, 1 Indiana, 144.
[3] Benedict *v.* Bray, 2 California, 251.
[4] Hibbs *v.* Blair, 14 Penn. State, 413; State *v.* Berry, 12 Missouri, 376.
[5] Barnes *v.* Webster, 16 Missouri, 258; Sheppard *v.* Collins, 12 Iowa, 570.
[6] Ball *v.* Gardiner, 21 Wendell, 270; Bennett *v.* Brown, 20 New York, 99.

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§ 153. Approaching now the subject of actions on these bonds, the inquiry arises, What is the intention of legislatures in requiring such bonds to be given? Is it that they shall supersede the common law action for malicious prosecution? If so, the defendant in the attachment can maintain no action, save on the bond. If not, then the bond must be intended, either as a mere security for what may be recovered in an action for malicious prosecution, or as authorizing a recovery of damages for a wrongful attachment, on other principles than those established by the common law in actions for malicious prosecution.

§ 154. On the first point, it has been uniformly decided, that the remedy of the attachment debtor for a wrongful attachment, by an action for malicious prosecution, is not affected by the execution of the bond, but that that remedy still subsists.[1]

§ 155. On the second point, it seems incontrovertible that the bond is not intended as a mere security for the payment of what may be recovered in an action for malicious prosecution; for if so intended, it should be conditioned for the payment of the damages which the defendant may sustain by reason of the attachment having been sued out maliciously and without probable cause; but such are never the terms used. Again, the penalty is always in a prescribed sum, which in many cases would be much less than the amount that might be recovered in an action for malicious prosecution. And again, if so intended, no action could properly be maintained upon it, until the damages had been liquidated and determined in an action for malicious prosecution; whereas, it is a constant practice to sue in the first instance on the bond, and has been repeatedly decided to be admissible.[2] Hence we apprehend that the bond is not intended merely as a security for damages recoverable in an action for malicious prosecution; and that in requiring such bonds, it is intended to authorize the recovery of other than such damages; and that a recovery on them is not restricted to that authorized by the principles of the common law governing actions for malicious prosecution.

[1] Sanders *v.* Hughes, 2 Brevard, 495; Donnell *v.* Jones, 13 Alabama, 490; Smith *v.* Story, 4 Humphreys, 169; Pettit *v.* Mercer, 8 B. Monroe, 51; Senecal *v.* Smith, 9 Robinson (La.), 418; Smith *v.* Eakin, 2 Sneed, 456; Bruce *v.* Coleman, 1 Handy, 515; Sledge *v.* McLaren, 29 Georgia, 64; Churchill *v.* Abraham, 22 Illinois, 455.

[2] Post, § 166.

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§ 156. This subject was discussed by the Court of Appeals of Kentucky, in a case where the condition of the bond was "for the payment of all costs and damages sustained by the defendant by reason of the wrongful issuing of the order for the attachment." In the course of the delivery of their opinion, the court express themselves in the following terms: "The extent to which the plaintiff has a right to recover in a suit of this kind, or in other words, his right to damages commensurate to the injury sustained by him in consequence of the extraordinary proceeding by attachment, forms the chief subject of inquiry in this case. Has he a right to show that his credit has been seriously affected, his sensibilities wounded, and his business operations materially deranged, in consequence of the attachment having been sued out; and to rely upon these matters to enhance the amount of damages? Or is he to be confined to the costs and expenses incurred by him, and such damages as he may have sustained by a deprivation of the use of his property, or any injury thereto, or loss or destruction thereof, by the act of the plaintiff in suing out the attachment?

"The defendant has a right to bring an action on the case against the plaintiff for a vexatious and malicious proceeding of this kind. In such a suit, damages may be claimed for every injury to credit, business, or feelings. But to sustain such a suit, and enable the plaintiff to succeed, malice upon the part of the defendant, and the want of probable cause, are both requisite. In a suit on the bond, the plaintiff is not bound to show malice, nor can the defendant rely, by way of defence, upon probable cause. It would seem, therefore, to follow, that such injuries as he is entitled to redress for, only where malice exists, and probable cause is wanting, could not, with any propriety, be estimated or taken into consideration in a suit on the bond. To allow it to be done would be inconsistent with all the analogies of the law, which should not be violated, unless it be imperiously required by the terms of the bond, or the presumed intention of the legislature.

"If an order has been obtained without just cause, and an attachment has been issued, and acted on in pursuance of the order, the terms of the bond secure to the defendant in the attachment all costs and damages that he has sustained in consequence thereof. The condition of the bond is satisfied, and its terms substantially complied with, by securing to him damages adequate to the injury to the property attached, and the loss arising from the dep-

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rivation of its use, together with the actual costs and expenses incurred.

"It cannot be rationally presumed that the legislature designed to impose on the security in the bond a more extensive liability. The statute is remedial in its character, and should be expounded so as to advance the object contemplated. To impose an almost unlimited liability on the security in the bond, sufficient to embrace every possible injury that the defendants might sustain, would be in effect to defeat in a great measure the object of the statute, by rendering it difficult, if not impracticable, for the plaintiff to execute the necessary bond."[1]

§ 157. The introduction of attachment bonds into the practice of the courts in Alabama, led to a change in the common law principles which would otherwise have regulated the action for a wrongful attachment. The first reported decision on this subject in that State, was made in an *action on the case;* in which the declaration charged that the defendant, without any just or probable cause, procured an attachment to be issued and levied on the plaintiff's property. This, as a declaration for malicious prosecution, was at the common law manifestly insufficient. Plea, not guilty, and issue. On the trial, the Circuit Court charged the jury that in this action it was essential to prove malice. Upon exception to this charge the case went to the Supreme Court, where the decision of the Circuit Court was overruled; the judgment of the Supreme Court manifestly resting on the existence of the law requiring a bond to be given, though the action was not on the bond. That law was considered as changing the common law rule in such cases.

"In actions for a malicious prosecution," said the court, "the malice of defendant must be proved, or implied from the circumstances, to entitle the plaintiff to recover. Is the action for wrongfully suing out an attachment to be regulated by the same principles? The original attachment is a process created by statute, authorized only in particular cases, its abuse carefully guarded against, and the remedy pursued in this way always

[1] Pettit *v.* Mercer, 8 B. Monroe, 51; Bruce *v.* Coleman, 1 Handy, 515. In Georgia, where the bond is for the payment of "all damages which may be recovered against the plaintiff" for suing out the attachment, it is held to be only security for the payment of such damages as may be recovered in an action for malicious attachment. Sledge *v.* McLaren, 29 Georgia, 64.

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liable to strict construction. By our statute regulating it, the plaintiff in an action so commenced is required to give bond and security conditioned to satisfy the defendant all costs and damages 'awarded for wrongfully suing out' (Act of 1807), or all such damages as he may sustain by the wrongful or vexatious suing out of such attachment (Act of 1814). In providing this extraordinary remedy for the plaintiff, the legislature intended also to protect the rights of defendants. It was obvious that the taking and detention of his property might be ruinous to the owner, although there was no sort of malice or corrupt motive in the party at whose suit it might be attached. Why should the condition prescribed for the bond be 'to pay all damages sustained by the *wrongful* or *vexatious* suing out,' if it had been the intention of the legislature that no damages should be recovered unless for the malicious suing out? If such had been their intention, would not the term *malicious* readily have occurred, and been used instead of those employed? A verbal criticism can hardly be necessary to prove that the party whose property is attached may find the proceeding wrongful and vexatious, that the suing it out may be ruinous to his credit and circumstances, though obtained without the least malice towards him. If the plaintiff, under color of the process, do, or procure to be done, what the law has not authorized, and the defendant is thereby injured, it seems clear that he is, in such case, as much as in any other, entitled to redress from the party whose illegal or 'wrongful' act has occasioned the injury, although it may have been done without malice."[1]

The next was also an action on the case, for suing out an attachment without any reasonable or probable cause, and for the purpose of vexing and harassing the plaintiff. The Supreme Court again held, that the expression of the legislative will, in designating the terms of the bond, indicated that the mere wrongful recourse to this process was a sufficient cause of action, and that malice was important only in connection with the question of damages.[2]

The same court held, that actions on attachment bonds are governed in all respects by the rule they had established as applicable to actions on the case, except the recovery, which could not

[1] Wilson *v.* Outlaw, Minor, 367; Kirksey *v.* Jones, 7 Alabama, 622.
[2] Kirksey *v.* Jones, 7 Alabama, 622; Seay *v.* Greenwood, 21 Ibid. 491.

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exceed the penalty of the bond.[1] This rule was expressed in these words: "Whenever an attachment is wrongfully sued out, and damage is thereby caused to the defendant in the suit, he is entitled, by force of the statutory provision, to recover for the actual injury sustained. And if, in addition to its being wrongfully sued out, it is also vexatiously, or in other terms, maliciously sued, then the defendant, upon the principle which governs the correlative action for a malicious prosecution, may recover damages as a compensation for the vexatious or malicious act; or, in the terms of the statute, such damages as he may be entitled to on account of the vexatious suit."[2]

§ 158. In Louisiana, the same views as those entertained in Alabama have been expressed, as well in actions on attachment bonds, as in those which, as reported, do not appear to be of that character. There, the bond is "for the payment of such damages as the defendant may recover, in case it should be decided that the attachment was wrongfully issued." While the common law principles governing actions for malicious prosecution are there fully recognized and affirmed,[3] it is held, that where no malice exists, the actual damage sustained may be allowed: if malice exists, vindictive damages may be recovered.[4]

§ 159. In Missouri, where the condition of the bond was "for the prosecution of the suit without delay and with effect, and the payment of all damages which should accrue to the defendant or any garnishee, in consequence of the attachment," the principles of the common law in regard to actions for malicious prosecution have not been applied to actions on these bonds, but on the contrary the recovery of actual damages was allowed in a case presenting no ingredient of malice.[5] And so in New York,[6] and in Ohio.[7]

[1] Hill *v.* Rushing, 4 Alabama, 212; McCullough *v.* Walton, 11 Ibid. 492.

[2] Kirksey *v.* Jones, 7 Alabama, 622; McCullough *v.* Walton, 11 Ibid. 492; Donnell *v.* Jones, 13 Ibid. 490; Sharpe *v.* Hunter, 16 Ibid. 765; Floyd *v.* Hamilton, 33 Ibid. 235.

[3] Senecal *v.* Smith, 9 Robinson (La.), 418; Grant *v.* Deuel, 3 Ibid. 17.

[4] Cox *v.* Robinson, 2 Robinson (La.), 313; Offutt *v.* Edwards, 9 Ibid. 90; Horn *v.* Bayard, 11 Ibid. 259; Littlejohn *v.* Wilcox, 2 Louisiana Annual, 620; Moore *v.* Withenburg, 13 Ibid. 22.

[5] Hayden *v.* Sample, 10 Missouri, 215.

[6] Dunning *v.* Humphrey, 24 Wendell, 31; Winsor *v.* Orcutt, 11 Paige, 578.

[7] Bruce *v.* Coleman, 1 Handy, 515.

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§ 160. In Tennessee, however, where the bond is conditioned "for satisfying all costs which shall be awarded to the defendant, in case the plaintiff shall be cast in the suit, and also all damages which shall be recovered against the plaintiff in any suit which may be brought against him, for wrongfully suing out the attachment," it was decided, in an action on the case for a wrongful attachment, that the principles of the common law remained unchanged;[1] and that in an action on the bond, a recovery might be had, not only for such damages as are properly recoverable in the common law action, but likewise for other damages, upon grounds contemplated by the statute, and not embraced by the principles governing the action on the case.[2]

§ 161. From this summary of the views of different courts on this subject, it is apparent that the execution of a cautionary bond by an attachment plaintiff, modifies the common law rule, and gives the defendant recourse against the plaintiff on the bond, for a wrongful attachment, where there existed no malice in suing it out. The practical working of this rule will be presently exhibited, in connection with the question of damages.

§ 162. The only party who can maintain an action on an attachment bond is the defendant. The bond is not required for the protection of the officer executing the attachment, nor for the indemnification of a third party whose property may be wrongfully attached, but simply for the benefit of the party against whom the writ issues. This was so held in Virginia, where the condition of the bond was "to pay all costs and damages which may be awarded against the plaintiff, or sustained by *any person*, by reason of his suing out the attachment."[3] And so in Louisiana.[4]

§ 162 *a*. No action will lie on the bond until the attachment shall have been discharged; and such final disposition of it must be alleged.[5]

§ 163. Where there are several defendants, and a bond in favor

[1] Smith *v.* Story, 4 Humphreys, 169.
[2] Smith *v.* Eakin, 2 Sneed, 456.
[3] Davis *v.* Commonwealth, 13 Grattan, 139.
[4] Raspillier *v.* Brownson, 7 Louisiana, 231; Edwards *v.* Turner, 6 Robinson (La.), 382.
[5] Nolle *v.* Thompson, 3 Metcalfe (Ky.), 121.

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of them all, the action on the bond must be in the name of all, though the attachment was levied on the separate property of each, in which they have not a joint interest. How the damages are to be divided between the obligees in the bond, is a matter with which the obligors have no concern, as they will be protected by a recovery in the names of all the obligees, from another action, by all, or either.[1]

§ 164. It is not at all necessary, in order to enable the party injured to maintain a suit on the bond, that he should obtain an order of the court in which the bond was filed, to deliver it to him for suit.[2]

§ 165. The sureties in the bond can be subjected to liability under it, only in reference to the particular writ for obtaining which it was given. This was decided in Louisiana, upon the following case: A. sued out an attachment, and gave bond. The attachment was not executed, and some time afterward A. voluntarily abandoned it, and took out another, without giving any new bond. It was held, that the liability of the surety on the bond extended only to the time of the abandonment of the first writ, and could not be revived without his consent.[3]

§ 166. The question is here presented, whether, in order to maintain an action on the bond, the damages must first be recovered in a distinct action? This is not believed to be requisite, and it was so decided in Virginia, where the bond is to pay "all such costs and damages as may accrue for wrongfully suing out the attachment";[4] in Alabama, where it is to pay "all such costs and damages as he might sustain by the wrongful or vexatious suing out of the attachment";[5] in Tennessee, where it is to pay "all damages which shall be recovered against the plaintiff in any suit which may be brought against him, for wrongfully suing out the attachment";[6] in Ohio, where it is "to pay all damages which the defendant may sustain by reason of the attachment, if the order therefor be wrongfully obtained";[7] and in Illinois, where it is

[1] Boyd v. Martin, 10 Alabama, 700. [2] Bruce v. Coleman, 1 Handy, 515.
[3] Erwin v. Com. & R. R. Bank, 12 Robinson (La.), 227.
[4] Dickinson v. McGraw, 4 Randolph, 158.
[5] Herndon v. Forney, 4 Alabama, 243.
[6] Smith v. Eakin, 2 Sneed, 456. [7] Bruce v. Coleman, 1 Handy, 515.

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"to pay and satisfy the defendant all such costs and damages as shall be awarded against the plaintiff in any suit which may hereafter be brought for wrongfully suing out the attachment."[1] The Supreme Court of Georgia, however, took a different view, where the bond was to pay "all damages which may be recovered against the said plaintiff for suing out the attachment"; terms almost the same as those in the Tennessee bond.[2] And in Mississippi, where the bond was "to pay and satisfy the defendant all such costs and damages as shall be awarded against him in any suit which may be hereafter brought for wrongfully suing out the attachment," it was held, that suit must first be brought against the principal in the bond, and that an action thereon against the sureties can only be maintained in the event of his failure to pay the costs and damages recovered against him in such suit.[3]

§ 167. Debt is undoubtedly the proper form of action on attachment bonds; but it has been held that covenant will lie.[4] In assigning breaches, it is not sufficient merely to negative the terms of the condition. The declaration must show that the attachment was wrongfully sued out, and what damages the plaintiff has sustained. Therefore, where the condition was, that the attachment plaintiff should prosecute his attachment to effect, and pay and satisfy the defendant all such costs and damages as he might sustain by the wrongful or vexatious suing out of such attachment; and the breach assigned was, that the obligor did not prosecute his attachment to effect, nor pay plaintiff the costs, damages, etc., which he sustained by the wrongful and vexatious suing out of the attachment, by means whereof the said bond became forfeited, and the defendant liable to pay the penalty; the declaration was held bad on demurrer.[5]

§ 168. In assigning breaches, if the damages alleged to have been sustained exceed the amount of the penalty, it is proper to assign the non-payment of the penalty. Where the damages claimed do not equal the penalty, the averment should be that they have not been paid.[6]

[1] Churchill *v.* Abraham, 22 Illinois, 455. [2] Sledge *v.* Lee, 19 Georgia, 411.
[3] Holcomb *v.* Foxworth, 34 Mississippi, 265. [4] Hill *v.* Rushing, 4 Alabama, 212.
[5] Flanagan *v.* Gilchrist, 8 Alabama, 620; Winsor *v.* Orcutt. 11 Paige, 578; Love *v.* Kidwell, 4 Blackford, 553.
[6] Hill *v.* Rushing, 4 Alabama, 212.

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§ 169. The recital in the condition that the plaintiff had issued a writ of attachment against the defendant, estops the obligors from denying by plea that the attachment was sued out, and such a plea is bad on general demurrer.[1]

§ 170. Under what circumstances may the attachment defendant maintain an action on the bond? Does the mere failure of the plaintiff to prosecute his suit work a forfeiture of the condition? The Supreme Court of Louisiana has gone very far in giving recourse on the bond in such case. There, it will be remembered, the obligation is "for the payment of such damages as the defendant may recover, in case it should be decided that the attachment was *wrongfully obtained*"; and it is held, that if a plaintiff voluntarily abandons his attachment, he renders himself and his surety responsible in damages. The same court, with less apparent reason, has gone further, and decided that, though it appear that the plaintiff had, at the commencement of his suit, a sufficient and very probable cause of action, and was prevented from getting a judgment by some technical objection, or irregularity in the proceedings, which could not be foreseen, the defendant may nevertheless hold him liable for the damages he actually sustained; and that, if an attachment be set aside by order of the court, it is *primâ facie* evidence that it was wrongfully obtained.[2] A decision was once given, that would seem to exempt the *surety* in such a case from liability;[3] but this doctrine was held to be inapplicable to the plaintiff.[4] As, in that State, the defendant's claim on the bond for damages undoubtedly rests on its being decided that the attachment was "*wrongfully obtained*," it is difficult to see upon what principle the plaintiff can be charged, when it is admitted that the attachment was *rightfully* obtained, but he failed to obtain a judgment, for technical reasons, having no connection with the merits of the action or the cause for attachment.

The Supreme Court of Alabama took a different view of the subject, and one more consonant with sound reason. In an action on an attachment bond, the condition of which was, "that the plaintiff should prosecute his attachment to effect, and pay the defendant all such costs and damages as he may sustain by the

[1] Love *v.* Kidwell, 4 Blackford, 553. [2] Cox *v.* Robinson, 2 Robinson (La.), 313.
[3] Garretson *v.* Zacharje, 8 Martin, N. S. 481.
[4] Cox *v.* Robinson, 2 Robinson (La.), 313.

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wrongful or vexatious suing out the attachment," it appeared that in the attachment suit, the defendant, by a plea in abatement, caused the attachment to be quashed, for informality in the affidavit upon which it issued, and then sued the plaintiff for damages. On the trial of this suit for damages, it was shown that there were good grounds for the attachment, though not sufficiently set out in the affidavit. The court charged the jury, that if they believed the attachment was sued out, and was abated on plea, the plaintiff was entitled to recover the actual damage he had sustained. The Supreme Court held this instruction to be wrong, and observed: "What is meant by the term 'wrongful,' as used in the statute to which this bond conforms? Was it, as is contended, designed to apply to defects in the form of the proceeding, on account of which the attachment should be quashed, as well as to the ground upon which it was to be issued? Or was the object of the framers of the act merely to provide a remedy against persons who should resort to this extraordinary remedy to the prejudice of another, without cause or sufficient ground therefor? We think that by the wrongful suing out of the attachment, is meant, not the omissions, irregularities, or informalities which the officer issuing the process may have committed in its issuance, but that the party resorted to it without sufficient ground."[1]

In Kentucky, where the bond was conditioned "for the payment of all costs and damages sustained by the defendant by reason of the wrongful issuing of the order for an attachment," — terms, in substance, equivalent to those of the Louisiana bond, — it was held, that a mere failure to prosecute the suit does not give an action on the bond. The order must have been procured wrongfully and without just cause, to constitute a breach of the condition, although the plaintiff may have abandoned the prosecution of the suit.[2]

In Tennessee, the condition of the bond is, "for satisfying all costs which shall be awarded to the defendant, in case the plaintiff shall be cast in the suit, and also all damages which shall be recovered against the plaintiff in any suit or suits which may be brought against him for wrongfully suing out the attachment"; and it has been there decided, that mere want of success does not *per se* subject the plaintiff to an action.[3]

[1] Sharpe *v.* Hunter, 16 Alabama, 765.
[2] Pettit *v.* Mercer, 8 B. Monroe, 51.
[3] Smith *v.* Story, 4 Humphreys, 169.

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§ 171. In an action on the bond, where, in the attachment suit, the proceedings were entirely *ex parte*, it is not sufficient merely to assign, as a breach of the condition, that the defendant did not owe the debt for which the attachment was sued out; he must set forth the proceedings under the attachment, and show that a judgment was given against him, and his property used to satisfy it; that he did not owe the debt; and that the attachment and judgment were illegal.[1]

§ 172. Where the cases in which an original attachment may issue are different from those authorizing an auxiliary or ancillary attachment, — a writ taken out in aid of a pending suit instituted by summons, — and the plaintiff in an *original* attachment is sued on his bond, he cannot, as a defence thereto, show that, when he obtained the attachment, facts existed which, under the law, would have justified an *ancillary* attachment.[2]

§ 173. Where an attaching plaintiff complies with all the requirements of the law in procuring an attachment, the presumption is, that it is rightfully sued out; and, if the defendant, in an action on the bond, claims that it was wrongfully done, the burden is upon him to establish that fact. Not that he must necessarily do it by positive testimony; but it may be shown by proof of such facts and circumstances as tend to establish the wrongful character of the act.[3] The failure of the attaching plaintiff to sustain his action, is undoubtedly *primâ facie* evidence in support of the defendant's action on the bond; but it is not conclusive proof that the attachment was either wrongfully obtained, in the sense of being merely obtained without sufficient cause, though without malice,[4] or that the attachment plaintiff acted wilfully wrong, that is maliciously, in suing it out.[5] The latter position will undoubtedly hold good in all cases, without regard to the particular manner in which the attachment suit was terminated in favor of the defendant; but it is deemed quite as certain, that, in an action in the former class of cases, where malice is not involved, and only the wrong of the attachment is to be established, *if the*

[1] Hoshaw *v.* Hoshaw, 8 Blackford, 258.
[2] Reynolds *v.* Culbreath, 14 Alabama, 581.
[3] Veiths *v.* Hagge, 8 Iowa, 163; Burrows *v.* Lehndorff, Ibid. 96.
[4] Sackett *v.* McCord, 23 Alabama, 851.
[5] Raver *v.* Webster, 3 Iowa, 502.

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suit was terminated by a finding in favor of the defendant, on an issue as to the truth of the facts alleged as the ground for the attachment, then the judgment would conclusively establish that the attachment was wrongfully obtained.[1]

But so far as the amount of the claim of the attachment plaintiff is involved in the question of the defendant's recourse upon the bond, the judgment in the attachment suit is conclusive; and if that be for a less sum than the law allows an attachment to issue for, it is complete evidence that the attachment was wrongfully obtained; though it does not settle the question of *wilful* wrong on the part of the attachment plaintiff.[2]

§ 173 *a*. In an action on the bond it is no defence, that the return on the attachment does not show a levy made according to the statute, if a levy *de facto* was made. Nor is it a justification, or mitigation of damages, that the claim sued on was a just one, where the statutory ground for suing out the attachment did not exist; for the claim may be just, and yet the attachment wrongful, and even wilfully wrong.[3]

§ 174. In an action on the bond, the attachment plaintiff cannot excuse himself, because, in obtaining the attachment, he acted in good faith;[4] nor is the matter of probable cause involved, except in relation to the question of damages; and no belief of the attachment plaintiff, however firm and sincere, that he had good ground for obtaining the attachment, can affect the defendant's right to recover against him the *actual damage* he has sustained.[5]

§ 175. What is this actual damage? On general principles it must be the natural, proximate, legal result or consequence of the wrongful act. Remote or speculative damages, such, for instance, as result from injuries to credit, business, character, or feelings, cannot be recovered.[6] Actual damage may be properly compre-

[1] Mitchell *v.* Mattingly, 1 Metcalfe (Ky.), 237.
[2] Gaddis *v.* Lord, 10 Iowa, 141. See post § 744.
[3] Drummond *v.* Stewart, 8 Iowa, 341.
[4] Churchill *v.* Abraham, 22 Illinois, 455.
[5] Alexander *v.* Hutchison, 9 Alabama, 825; Donnell *v.* Jones, 13 Ibid. 490; Pettit *v.* Mercer, 8 B. Monroe, 51. *Sed contra*, Mahnke *v.* Damon, 3 Iowa, 107.
[6] Donnell *v.* Jones, 13 Alabama, 490; Reidhar *v.* Berger, 8 B. Monroe, 160; State *v.* Thomas, 19 Missouri, 613; Floyd *v.* Hamilton, 33 Alabama, 235; Campbell *v.* Chamberlain, 10 Iowa, 337.

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hended under two heads,—1. Expense and losses incurred by the party in making his defence to the attachment proceedings; and 2. The loss occasioned by his being deprived of the use of his property during the pendency of the attachment, or by an illegal sale of it, or by injury thereto, or loss or destruction thereof.[1] For losses and trouble of these descriptions, the attachment defendant should be liberally remunerated.[2]

§ 176. Under the first head, will be allowed expenses incurred in obtaining testimony on a trial — where such is by law authorized — of the truth of the affidavit on which the attachment was issued;[3] costs of suit to which the defendant has been subjected;[4] as well in an appellate court, as in that in which the suit was brought;[5] and fees paid to counsel for services in the attachment suit;[6] but not fees to counsel for services in the action for damages.[7] Where the attachment is not the original process, but is ancillary to an action instituted by summons, no costs connected with the defence of the suit, in aid of which the attachment was obtained, can be recovered.[8] When it is sought to recover for counsel fees in defending the attachment, it is held, in Kentucky, that no recovery can be had unless the fees were paid, or contracted to be paid, and are proved to be reasonable.[9]

§ 177. The rule of damages under the second head has been variously laid down. In New York, it was said by the Supreme Court: "The plaintiff is entitled to such damages as a jury may think he has sustained by the wrongful seizing and detaining of his property. If it was taken out of his possession, he may be entitled to the value of it; if seized and left in his possession, to

[1] Cox *v.* Robinson, 2 Robinson (La.), 313; Horn *v.* Bayard, 11 Ibid. 259; Pettit *v.* Mercer, 8 B. Monroe, 51; Reidhar *v.* Berger, Ibid. 160.

[2] Offutt *v.* Edwards, 9 Robinson (La.), 90; Campbell *v.* Chamberlain, 10 Iowa, 337.

[3] Hayden *v.* Sample, 10 Missouri, 215.

[4] Dunning *v.* Humphrey, 24 Wendell, 31; Winsor *v.* Orcutt, 11 Paige, 578; Trapnall *v.* McAfee, 3 Metcalfe (Ky.), 34.

[5] Bennett *v.* Brown, 31 Barbour, 158; s. c. 20 New York, 99.

[6] Offutt *v.* Edwards, 9 Robinson (La.), 90; Littlejohn *v.* Wilcox, 2 Louisiana Annual, 620; Phelps *v.* Coggeshall, 13 Ibid. 440; Accessory Transit Co. *v.* McCerren, Ibid. 214; Trapnall *v.* McAfee, 3 Metcalfe (Ky.), 34; Seay *v.* Greenwood, 21 Alabama, 491; Morris *v.* Price, 2 Blackford, 457. *Sed contra*, Heath *v.* Lent, 1 California, 410.

[7] Offutt *v.* Edwards, 9 Robinson (La.), 90.

[8] White *v.* Wyley, 17 Alabama, 167.

[9] Shultz *v.* Morrison, 3 Metcalfe (Ky.), 98.

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such damages as may be awarded for the unlawful intermeddling with his property."[1] But the same court afterwards held, that no more than nominal damages can be recovered, where the defendant is not dispossessed.[2]

§ 178. In Kentucky, it was determined that the plaintiff can only recover damages for the injury he has sustained by being deprived of the use of his property, or its loss, destruction, or deterioration.[3] Subsequently, the court stated the rule on some points more specifically, and said: "The inquiry in regard to the injury which the party may sustain by the deprivation of the use of his property, should be limited to the actual value of the use: as, for example, the rent of real estate, the hire or services of slaves, or the value of the use of any other species of property in itself productive. The property in this case was not of that character, and the injury from being deprived of its use should be restricted to the interest on the value thereof. For any injury beyond that, the damages would be conjectural, indefinite, and uncertain, and the plaintiff cannot recover in this action. If, however, the property is damaged, or if when returned it should be of less value than when seized, in consequence of the depreciation in price, or from any other cause, for such difference the plaintiff would be entitled to recover. But this rule, so far as it relates to the fall or depreciation of the price, would not be applicable to every species of property. It would, however, clearly apply in this case, as it was the trade and business of the party to vend the goods attached, and not to keep them for mere use."[4]

§ 179. The court properly intimated, in the language just quoted, that the allowance for depreciation in the value of the property while under attachment would not be applicable to every species of property. For instance, if real estate be attached, without interfering with the defendant's possession, nothing can be recovered in an action on the bond, on account of depreciation in its value during the pendency of the attachment.[5]

§ 180. In Louisiana, the following case arose. Certain parties

[1] Dunning v. Humphrey, 24 Wendell, 31.
[2] Groat v. Gillespie, 25 Wendell, 383.
[3] Pettit v. Mercer 8 B. Monroe, 51.
[4] Reidhar v. Berger, 8 B. Monroe, 160.
[5] Heath v. Lent, 1 California, 410.

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took out an attachment in February, 1842, against the Girard Bank, and seized certain *choses in action*, which, at the time, and for some months after, were worth in New Orleans $18,500. In August, 1842, the attachment plaintiffs, having obtained judgment, caused the *choses in action* to be sold by the sheriff, at a great sacrifice, for the sum of $9,140. Afterwards, the judgment was reversed, and the assignees of the bank sued the attachment plaintiffs for the difference between these sums, and recovered judgment for $5,145 damages. Whether the suit was on the attachment bond, does not appear in the report of the case. The Supreme Court affirmed the judgment, holding the plaintiffs entitled to recover the actual damage sustained.[1]

§ 181. In New York, an action was brought on an attachment bond, where it appeared that the plaintiff in the attachment was nonsuited; but immediately after sued out another attachment, and seized the same property that was attached in the first suit; and afterwards, on obtaining judgment, caused the property to be sold under his execution. It was held, that the application of the defendant's property to the satisfaction of the judgment in the second suit, was properly admissible in evidence, to reduce the amount of damages sought to be recovered.[2]

§ 182. The liability of an attachment plaintiff for actual damage exists as well where the attachment is sued out by his attorney as where he obtains it himself; but no malice exhibited by the attorney in his proceedings can be given in evidence against his client, so as to make him liable for exemplary damages.[3] And where the attachment was taken out by an agent, who also executed the bond, the declaration on the bond was held to be insufficient, which charged that the attachment was wrongfully and vexatiously sued out by the obligors in the bond: it should have averred that it was so sued out by the plaintiff.[4]

§ 183. An administrator who sues out an attachment and executes the bond, describing himself therein as administrator, cannot

[1] Horn *v.* Bayard, 11 Robinson (La.), 259.
[2] Earl *v.* Spooner, 3 Denio, 246.
[3] Kirksey *v.* Jones, 7 Alabama, 622; McCullough *v.* Walton, 11 Ibid. 492.
[4] McCullough *v.* Walton, 11 Alabama, 492.

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be sued on the bond in his representative character, nor can he subject the estate to an action for damages by his tortious conduct. He is liable to respond personally for the injury, and is properly sued in his individual character.[1]

[1] Gilmer v. Wier, 8 Alabama, 72.

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CHAPTER VII.

EXECUTION AND RETURN OF AN ATTACHMENT.

§ 183 *a*. WHEN a writ of attachment is placed in the hands of an officer to be executed, his first duty — and one which he cannot ever safely overlook — is, to ascertain that it was issued by an officer having legal power to issue it; for if issued by one having no such power, it is absolutely void, and will afford no protection whatever to him who acts under it.[1]

§ 184. The officer should also see that the writ is substantially legal in form; for if defective in this respect, a levy under it may be inoperative. Thus, where an attachment was made on the 28th of December, 1822, under a writ dated the 28th of February, 1822, and returnable to the next May Term of the court after its date; and trover was brought against the officer for the property; it was held, that the officer should not be permitted to prove that the writ was in fact sued out on the 28th of December, 1822, and was intended to be made returnable at May Term, 1823, but the word "February" had been inserted by mistake, instead of "December"; and that, as the writ was made returnable at May Term, 1822, and then became *functus officio*, nothing could be done under it in December, 1822.[2]

§ 185. If the writ be in legal form, and issued out of a court having competent jurisdiction, it will be a complete justification to the officer in attaching the defendant's property, and in using, to effect the attachment, all necessary force; and there can, therefore, be no obligation on him to investigate whether the preliminary steps required for obtaining it have been pursued.[3] Nor has

[1] Morrison *v.* Lovejoy, 6 Minnesota, 183; Guerin *v.* Hunt, 8 Ibid. 477.

[2] Dame *v.* Fales, 3 New Hamp. 70.

[3] Fulton *v.* Heaton, 1 Barbour, 552; Kirksey *v.* Dubose, 19 Alabama, 43; Banta *v.* Reynolds, 3 B. Monroe, 80; Garnet *v.* Wimp, Ibid. 360; Ela *v.* Shepard, 32 New Hamp. 277; Owens *v.* Starr, 2 Littell, 230; Lovier *v.* Gilpin, 6 Dana, 321; Walker *v.* Woods, 15 California, 66; Booth *v.* Rees, 26 Illinois, 45; State *v.* Foster, 10 Iowa, 435.

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he anything to do with the question whether the debt is actually due. It may be that no cause of action exists; but with that he has no concern; for it is not his province to decide the question of liability between the parties.[1]

§ 186. If a writ of attachment be placed in the hands of a person specially deputed to serve it, he has all the powers which may be exercised by a sheriff in the premises, but he is not entitled of right to be recognized or obeyed as a sheriff, or known officer, but must show his authority, and make known his business, if required by the party who is to obey that authority. In this particular he represents a special bailiff, rather than a known officer. It has been held, therefore, that a person so deputed may, equally with a sheriff, break into a warehouse to get access to goods, where admittance is refused him.[2]

§ 187. An attachment comes within the terms of a statute forbidding the service on Sunday of any "writ, process, order, warrant, judgment, or decree"; and a service of it on that day will be set aside on motion; but cannot be reached by a plea in abatement.[3] But where there is no prohibitory statute, it may be executed on that day.[4] If a writ of attachment be delivered to an officer on Sunday, he is not to be regarded as having officially received it, nor can he be held responsible for not executing it, on that day. He may, if he choose, recognize the receipt of it, but that will impose on him no higher or other duties, than if he had received it on the next day.[5] In England it is said that Christmas is considered a *dies non-juridicus;* but it was held not so in this country.[6]

§ 187 *a*. The authority of an officer to levy an attachment continues until the return day of the writ, or until he has actually returned it, if he do so before that day. The fact that before the return day he indorsed on the writ a return of "no property found," but kept the writ in his hands, will not prevent his subse-

[1] Livingston *v.* Smith, 5 Peters, 90; Walker *v.* Woods, 15 California, 66; Mamlock *v.* White, 20 Ibid. 598.
[2] Burton *v.* Wilkinson, 18 Vermont, 186.
[3] Cotton *v.* Huey, 4 Alabama, 56.
[4] Matthews *v.* Ansley, 31 Alabama, 20.
[5] Whitney *v.* Butterfield, 13 California, 335. [6] Starke *v.* Marshall, 3 Alabama, 44.

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quently levying it, and making return of the levy, at any time before the return day.[1]

§ 188. It is the duty of an officer, on receiving a writ of attachment, to levy it on any property of the defendant he can find, of the description recited in the writ. It is never discretionary with him, if he finds such property, whether to execute the writ or not; nor is he allowed to provide for the plaintiff another remedy than that afforded by the writ, for the collection of his debt. He must take the property into the custody of the law. Any agreement to induce him to omit the performance of his duty is void, upon considerations of public policy. Thus, where an officer, having a writ of attachment in his hands, was induced to forbear levying it, by the defendant's executing a bond in favor of the plaintiff, with security, conditioned to save the officer harmless by reason of his not proceeding to attach property, and to pay whatever judgment might be rendered against the defendant; and the plaintiff afterwards recovered judgment in the attachment suit, and, failing to make the money therein, sued upon the bond; it was held, that no action could be maintained on it, and that it was not such a security as the plaintiff, by adopting, could render valid.[2]

§ 189. To ascertain who is the actual owner of personal property, notwithstanding the indication arising from acts of ownership, is often attended with difficulty; and an officer ought not to be holden to proceed to make an attachment, without an indemnity, where there is great danger of his committing a trespass in so doing; and where he has good reason to doubt whether goods are the property of the defendant, he may insist on the plaintiff's showing them to him, and also on being indemnified.[3]

§ 189 *a*. When an officer takes a writ, with directions to serve it in a particular manner, without requiring of the plaintiff an indemnity, he is bound to serve it, if he can, according to the instructions; and it is not a sufficient excuse for him that he subsequently obtained information which led him to suppose that a

[1] Courtney *v.* Carr, 6 Iowa, 238.

[2] Cole *v.* Parker, 7 Iowa, 167; Denson *v.* Sledge, 2 Devereux, 136.

[3] Bond *v.* Ward, 7 Mass. 123; Sibley *v.* Brown, 15 Maine, 185; Ranlett *v.* Blodgett, 17 New Hamp. 298; Smith *v.* Cicotte, 11 Michigan, 383; Chamberlain *v.* Beller, 18 New York, 115; Shriver *v.* Harbaugh, 37 Penn. State, 399.

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service in the manner directed would be ineffectual for the interests of the plaintiff, and even expose himself to an action, if his supposition was erroneous, and a service in the manner directed would, in fact, have been legal and effectual. He is liable unless he can show that he could not lawfully have obeyed the directions.[1]

§ 190. The officer is bound to attach sufficient property, if it can be found, to secure the amount of the plaintiff's claim, as stated in the writ, and failing in this he will be liable for any deficiency.[2] Where, therefore, an officer levied three attachments successively on a defendant's personal property, and, having received a fourth writ, levied it on his real estate, the proceeds of which were absorbed in satisfying that writ, and it was afterwards ascertained that the personalty on which the preceding three writs were levied was not sufficient to satisfy them; it was held, that the officer was liable for the deficiency; that he might have levied all the writs on all the property; that he was bound at his peril, if he did not levy on all, to levy on enough to satisfy the demands; and that he was not excused by the fact that an appraisement of the personalty, made after the levy, indicated an amount sufficient for that purpose.[3] If in such case an officer represent to the plaintiff that he made an attachment, when in point of fact he did not, and thereby induce the plaintiff to rely upon it, and to forego making any further attachment, when he might have done so, the officer is bound by his representation, and when sued by the plaintiff for failing to attach sufficient property, is estopped from showing that in fact he made no legal attachment.[4] But if, by a mistake of the plaintiff in making out the writ, the amount which the

[1] Ranlett *v.* Blodgett, 17 New Hamp. 298.

[2] In Fitzgerald *v.* Blake, 42 Barbour, 513, the Supreme Court of New York used the following language: "It is the duty of the sheriff to attach so much of the property of the defendant as will be sufficient to satisfy the plaintiff's demand, with costs and expenses. In this case the sheriff has levied on so much as he considered sufficient. The extent of the seizure was within the exercise of a sound discretion by the sheriff. If his levy was excessive, the defendant might complain; and if insufficient, the plaintiff. He is responsible to both parties for the exercise of a sound and reasonable discretion in performing his duty. The plaintiff has no authority to dictate the extent of the levy, any more than the defendant has to limit it. The plaintiff can point out property to the sheriff, and require a levy upon so much as will be sufficient, but the sheriff must decide for himself, upon the responsibility which attaches to his office, as to the extent and sufficiency of the seizure."

[3] Ransom *v.* Halcott, 18 Barbour, 56.

[4] Howes *v.* Spicer, 23 Vermont, 508.

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sheriff is required to secure is less than the debt sued on, and the sheriff receive from the defendant a sum of money equal to the amount named in the writ and costs, and release property attached by him, which was of sufficient value to have secured the whole debt; the sheriff will not be held responsible for the difference between the amount paid him and that of the judgment recovered by the attachment plaintiff; for he was misled by the mistake of the plaintiff himself.[1]

§ 191. It is the duty of the officer to execute the writ as soon as he reasonably can after it comes into his hands; for if by his unnecessary delay in seizing property or summoning garnishees the plaintiff loses his debt, the officer will be liable; and his liability will not be avoided by his showing that he was not specially required to serve the writ immediately, or that it was in fact served within the time authorized by its terms.[2] And after the attachment is begun, it should be continued with as little interruption as possible. Delay or interruption in the discharge of this duty may involve the officer in serious consequences. No general rule governing such cases can well be laid down; but each case must depend very much on its particular circumstances. As a proposition generally applicable, however, it may be said that the officer should take care that his levy be a continuous and single act, as contradistinguished from a number of distinct acts, performed at different times, and not in reasonable and necessary connection.

§ 191 *a*. While the law holds an officer to a strict performance of his duty in the execution of process placed in his hands, and tolerates no wanton disregard of that duty, nor sanctions any negligence, yet it requires no impossibilities, nor does it impose unconscionable exactions. When an attachment comes to his hands, he must execute it with all reasonable celerity; but he is not held to the duty of starting, on the instant after receiving it, to execute it, without regard to other business demanding his attention, unless some special reasons for urgency exist, and are made known to him. Reasonable diligence is all that is required of him in such a case; and what is reasonable diligence depends upon the particular facts of the case. If, for example, an officer

[1] Page *v.* Belt, 17 Missouri, 263.

[2] Kennedy *v.* Brent, 6 Cranch, 187.

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receives no special instruction to execute a writ at once, and there is no apparent necessity for its immediate execution, it would not be contended that he was under the same obligation to execute it instantaneously as if he were so instructed, or there were apparent circumstances of urgency. But in the case of an attachment sued out on the ground of the defendant's fraud, or his being in the act of leaving the State, or removing his property, the very fact of the issue of the writ on such ground, would seem to indicate to the officer the necessity for immediate action. These views were applied, in California, to a case where a writ was placed in the hands of a sheriff between nine and ten o'clock on a Sunday night, and another writ was delivered to a deputy of his, at fifteen minutes after twelve o'clock, and was executed by the deputy at one o'clock on Monday morning; of which second writ the sheriff had no knowledge until after it was executed; and the service by the deputy held the property in favor of the second attachment. The plaintiff in the first attachment sued the sheriff for not levying it in due time; but it was held, that the attachment was not legally in his hands until the expiration of Sunday, and that his delay in executing it, for one hour after midnight, did not entitle the plaintiff to recover.[1]

§ 191 *b*. It not unfrequently happens that no property is found whereon to levy an attachment, and the action proceeds to judgment under the summons. In such case the rendition of the judgment supersedes the attachment, and thereafter no action can be taken under it.[2]

§ 192. Where a variety of articles are attached, and it requires considerable time to complete the service of the process, if the officer, after he has begun it, continues in it with no unnecessary delay, until he has secured all the goods, the taking is to be treated as one act. But where an officer took and removed sundry finished carriages, to an amount which he deemed sufficient to secure the demand in the writ, and, on the day following, having changed his mind in regard to some of the property, he determined not to take away a part of the finished carriages he had attached, but, in lieu thereof, to make another attachment of un-

[1] Whitney *v.* Butterfield, 13 California, 335.
[2] Scheib *v.* Baldwin, 22 Howard Pract. R. 278.

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finished work, which he did, and then removed the unfinished work, with part of that first attached; it was held, that the attachment might properly be considered as consisting of two distinct acts.[1]

§ 193. An attachment effected by unlawful or fraudulent means is illegal and void. Such, for example, is the case of entering a dwelling-house against the owner's will, and attaching his property there; to which more particular reference will presently be made.[2] Such, too, is the case of a plaintiff fraudulently obtaining possession, in one State, of the property of his debtor, and removing it clandestinely into another State, and there attaching it.[3] So, likewise, where the plaintiff decoyed a slave from one State into another, for the purpose of attaching him for the debt of his owner.[4] And so, where the officer watched the defendant at work in his field, where he might have served the writ upon him, but did not do so, and waited till the plaintiff's agent enticed the defendant out of the State, and then attached the defendant's real estate, "for want of his body, goods, and chattels."[5] So, where a suit by attachment was brought in the United States Circuit Court for Louisiana, against one alleged to be a citizen of that State, and property was levied on in the interior of the State and brought to New Orleans; and the plaintiff then dismissed that suit, and brought another in the State court, on the ground that the defendant was a non-resident of that State, and levied the attachment on the same property; the court set aside the attachment, on the ground that a levy brought about by such means could not be sustained.[6] So, where a sheriff, in a county where he was not an officer, took property, under pretence of having a writ, and carried it to another county, in order to bring it within the reach of legal process.[7] And so where, on the suggestion of the counsel for the attachment plaintiff, a trunk was produced and opened, under cover and pretence of a criminal examination then progressing, but really for the purpose of levying an attachment upon money

[1] Bishop v. Warner, 19 Conn. 460.
[2] Post, § 200.
[3] Powell v. McKee, 4 Louisiana Annual, 108; Paradise v. Farmers and Merchants' Bank, 5 Ibid. 710; Wingate v. Wheat, 6 Ibid. 238; Myers v. Myers, 8 Ibid. 369.
[4] Timmons v. Garrison, 4 Humphreys, 148.
[5] Nason v. Esten, 2 Rhode Island, 337; Metcalf v. Clark, 41 Barbour, 45.
[6] Gilbert v. Hollinger, 14 Louisiana Annual, 441.
[7] Pomroy v. Parmlee, 9 Iowa, 140.

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contained in it.[1] While, however, the law will annul every attachment obtained by unlawful or fraudulent means, an officer will not be subjected to damages therefor, unless he acted with *a purpose* to effect the attachment by such means. A mere illegal possession followed by a seizure will not be sufficient. Therefore, where an officer made an attachment that was illegal, and abandoned it, and made a second seizure, the latter was sustained, because it did not appear that the first was made with the purpose of holding the property, in order to effect the second levy.[2]

§ 194. In executing the writ, the officer should act in conformity to the law under which he proceeds; for, if the service be illegal, no lien is created on the property.[3] He must also perform his duty in such a manner as to do no wrong to the defendant. On such occasions he must be allowed the exercise of some discretion, and is not to be made liable for every trivial mistake of judgment he may make in doubtful cases. But the discretion allowed him must be a sound discretion, exercised with perfect good faith, and with an intent to subserve the interests of both the debtor and the creditor.[4] For, when an officer wholly departs from the course pointed out to him by the law, he may be considered as intending from the beginning to do so, and as making use of the process for a mere pretence and cover; and, therefore, he is liable in the same manner, and for the same damages, as he would have been, if he had done the same acts without the legal warrant he abused; he will be considered a trespasser *ab initio*. In other words, he who at first acts with propriety under an authority or license given by law, and afterwards abuses it, shall be considered a trespasser from the beginning.[5] The reason of this rule is, that it would be contrary to sound public policy, to permit a man to justify himself at

[1] Pomroy *v.* Parmlee, 9 Iowa, 140.

[2] Gile *v.* Devens, 11 Cushing, 59.

[3] Gardner *v.* Hust, 2 Richardson, 601.

[4] Barrett *v.* White, 3 New Hamp. 210. In Taylor *v.* Jones, 42 New Hamp. 25, the court said: "Such an error or mistake as a person of ordinary care and common intelligence might commit, will not amount to an abuse; but there must be a complete departure from the line of duty, or such an improper and illegal exercise of the authority to the prejudice of another, — such an active and wilful wrong perpetrated, — as will warrant the conclusion that its perpetrator intended from the first to do wrong, and to use his legal authority as a cover for his illegal conduct. Where the acts proved warrant no such conclusion, the person charged with them is not a trespasser."

[5] Barrett *v.* White, 3 New Hamp. 210.

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all under a license or authority, allowed him by law, after he has abused the license or authority, and used it for improper purposes. The presumption of law is, that he who thus abuses such an authority, assumed the exercise of it, in the first place, for the purpose of abusing it. The abuse is, therefore, very justly held to be a forfeiture of all the protection which the law would otherwise give. Therefore, where an officer attached certain hay and grain in a barn, and, without any necessity, removed the same from the barn at an unfit and unreasonable time, when it must inevitably be exposed to great and unnecessary waste and destruction, it was held, on the principles above stated, to be such an abuse as to render the officer a trespasser *ab initio*.[1]

§ 194 *a*. The term *trespasser ab initio* is of frequent occurrence in connection with the acts of officers executing attachments, and it is not without use to note the signification of the term in this connection. An officer executing lawful process in a lawful manner, can never be a trespasser. But if he act under unlawful process, or execute lawful process in an unlawful manner, he is so. And whenever he does such acts as authorize his being considered in law a trespasser *ab initio*, all acts done by him in the particular case are unlawful, and he may be held responsible therefor, just as if he had been devoid of any authority, seeming or real. If he has attached property, he cannot hold it, if the defendant chooses to reclaim it; or, if he hold it, is liable to the defendant for its value.[2] But if the defendant receive back the property, or it was legally disposed of for his benefit, such fact would, in an action by him against the officer for the trespass, go in mitigation of damages.[3]

§ 195. The officer should be careful not to levy the writ on any property not liable to attachment; for if he do, he will be considered a trespasser.[4] But if, in seizing an article, — as, for instance, a trunk, — he is under a necessity of taking into his possession with it articles exempt from attachment, and he intermeddles

[1] Barrett *v.* White, 3 New Hamp. 210; Peeler *v.* Stebbins, 26 Vermont, 644.
[2] Collins *v.* Perkins, 31 Vermont, 624.
[3] Yale *v.* Saunders, 16 Vermont, 243; Stewart *v.* Martin, Ibid. 397.
[4] Foss *v.* Stewart, 14 Maine, 312; Bean *v.* Hubbard, 4 Cushing, 85; Richards *v.* Daggett, 4 Mass. 534; Gibson *v.* Jenney, 15 Ibid. 205; Howard *v.* Willams, 2 Pick. 80; Lynd *v.* Picket, 7 Minnesota, 184.

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with them to no greater extent than to remove them from the trunk, and deliver them to the owner, or, upon the owner's declining to receive them when offered, then to keep them safely until called for, he commits no wrong.[1] And if the defendant assent to the attachment at the time, it will be valid; and a subsequent assent will make it good *ab initio*.[2] If the property is a part of a larger quantity than the law exempts, the defendant must set apart such portion as is exempted, and claim it as such, or he will be held to have consented to its being attached.[3]

§ 196. If an officer attach personalty not the property of the defendant, he is, of course, a trespasser on the rights of the owner, who may maintain either trover, trespass, or replevin against him. Such an attachment is a tortious act, which is itself a conversion, and if trover be brought, no demand on the officer need be proved.[4] And if he acts by the direction of the plaintiff, the latter is regarded as equally guilty and equally liable for the trespass;[5] but not if he take no part in the levy,[6] unless he afterward ratify it; and he will be held to have ratified it, when he defends against a claim of property filed by the owner in the attachment suit.[7] And against either officer or plaintiff, where both engage in the act, suit may be brought at once, without any demand or notice,[8] and without the owner being under obligation to take any steps in the suit in which the seizure is made;[9] but if he take such steps, and claim the property in the attachment cause, and recover judgment for its restitution, his right to recover damages for the illegal taking and detention will not be thereby impaired.[10] If, however, after thus claiming the property, he agree with the other parties to the suit, that the officer may sell it, and hold the proceeds subject to the final decision of the controversy, it is considered, in Louisiana, to amount to a waiver of his claim against the officer for damages.[11]

[1] Towns *v.* Pratt, 33 New Hamp. 345.
[2] Hewes *v.* Parkman, 20 Pick. 90.
[3] Nash *v.* Farrington, 4 Allen, 157; Clapp *v.* Thomas, 5 Ibid. 158.
[4] Woodbury *v.* Long, 8 Pick. 543; Ford *v.* Dyer, 26 Mississippi, 243; Meade *v.* Smith, 16 Conn. 346; Caldwell *v.* Arnold, 8 Minnesota, 265.
[5] Marsh *v.* Backus, 16 Barbour, 483.
[6] Butler *v.* Borders, 6 Blackford, 160
[7] Perrin *v.* Claflin, 11 Missouri, 13.
[8] Tufts *v.* McClintock, 28 Maine, 424.
[9] Shuff *v.* Morgan, 9 Martin, 592.
[10] Trieber *v.* Blacher, 10 Maryland, 14. [11] Judson *v.* Lewis, 7 Louisiana Annual, 55.

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§ 197. The necessity for the officer's making due inquiry concerning the property he attaches is so highly regarded, that he will be treated as a trespasser for seizing property not belonging to the defendant, even though the owner give him no special notice that the property is his, and make no demand for it.[1] And the remedy of the owner against the officer is not impaired by the owner becoming the receipter to the officer for the property; for in such case the owner is bound by the terms of the receipt to retain the property and have it ready for delivery on demand; and in an action on the receipt would be estopped from setting up property in himself.[2]

§ 198. What will amount to an attachment, for which trespass may be maintained, may admit of question. In Pennsylvania it was held, that the return by an officer that he had attached goods, which appear not to have been the defendant's, subjects the officer to an action of trespass, where the property was bound by the levy, and was in the officer's power, though there was no manual handling or taking them into possession.[3] The same doctrine has been recognized in Massachusetts,[4] and New Hampshire.[5] But where an officer had a writ, and found the defendant in possession of property, and informed him that he was directed to make an attachment; and the defendant informed the officer that the property was not his; and the officer did not take it or interfere with it; and the defendant obtained a receipter for it; and it did not appear that any return of an attachment was made; it was held, not to amount to a conversion by the officer.[6]

§ 199. The doctrines of the common law in relation to *confusion of goods*, have been partially brought into view and applied, in connection with the execution of attachments. What will constitute a confusion of goods, has been the subject of much discussion. Intermixture is not necessarily a convertible term with confusion; for there may be intermixture without confusion, though there can be no confusion without intermixture. Confu-

[1] Stickney *v.* Davis, 16 Pick. 19.
[2] Robinson *v.* Mansfield, 13 Pick. 139; Johns *v.* Church, 12 Ibid. 557.
[3] Paxton *v.* Steckel, 2 Penn. State, 93.
[4] Gibbs *v.* Chase, 10 Mass. 128; Miller *v.* Baker, 1 Metcalf, 27.
[5] Morse *v.* Hurd, 17 New Hamp. 246.
[6] Rand *v.* Sargent, 23 Maine, 326.

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sion takes place when there has been such an intermixture of similar articles owned by different persons, as that the property of each can no longer be distinguished.[1] Confusion may be predicated of such things as money, corn, or hay, which have nothing in their appearance by which one quantity may be distinguished from another. And so it has been held, in the case of logs, of the same description of wood and similarly cut.[2] But where the articles are readily distinguishable from each other, there is no confusion; as in the case of cattle,[3] or of crockery ware and china placed on the same shelf.[4]

When an officer proceeds to execute an attachment, he is authorized to seize any personalty found in the defendant's possession, if he have no reason to suppose it to be the property of another. If it happen that the goods of a stranger are intermixed with those of the defendant, even without the owner's knowledge, the owner can maintain no action against the officer for taking them, until he have notified the officer, and demanded and identified his goods, and the officer shall have delayed or refused to deliver them.[5] In such case the officer cannot be treated as a trespasser for *taking* the goods; but if he sell the whole, after notice of the owner's claim, it will be a conversion, for which trover may be maintained.[6]

If a party wilfully intermingle his goods with those of another, so that they cannot be distinguished, the other party is, by the principles of the common law, entitled to the entire property,

[1] Hesseltine *v.* Stockwell, 30 Maine, 237; Tufts *v.* McClintock, 28 Ibid. 424. In Robinson *v.* Holt, 39 New Hamp. 557, the court said: "The doctrine of the confusion of goods has been often discussed, and may be considered as clearly and distinctly settled. If the goods of several intermingled can be easily distinguished and separated, no change of property takes place, and each party may lay claim to his own. If the goods are of the same nature and value, although not capable of an actual separation by identifying each particular, if the portion of each owner is known, and a division can be made of equal proportionate value, as in the case of a mixture of corn, coffee, tea, wine, or other article of the same kind and quality, then each may claim his aliquot part; but if the mixture is undistinguishable, because a new ingredient is formed, not capable of a just appreciation and division according to the original rights of each, or if the articles mixed are of different values or quantities, and the original values or quantities cannot be determined, the party who occasions, or through whose fault or neglect occurs the wrongful mixture, must bear the whole loss."

[2] Loomis *v.* Green, 7 Maine, 386; Hesseltine *v.* Stockwell, 30 Ibid. 237.

[3] Holbrook *v.* Hyde, 1 Vermont, 286.

[4] Treat *v.* Barber, 7 Conn. 274.

[5] Tufts *v.* McClintock, 28 Maine, 424; Wilson *v.* Lane, 33 New Hamp. 466.

[6] Lewis *v.* Whittemore, 5 New Hamp. 364; Albee *v.* Webster, 16 Ibid. 362; Shumway *v.* Rutter, 8 Pick. 443.

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without liability to account for any part of it.[1] In that case, an officer cannot attach any of the goods for a debt of him who caused the intermixture;[2] but may attach the whole for the debt of the innocent party; and if the former would reclaim his property by law, the burden of proof is on himself, to distinguish his goods from those of the defendant.[3] If he know of the attachment, and fail to notify the officer of his claim, he cannot subject the officer to any accountability for the seizure.[4]

If an officer be notified, or have reason to believe, that goods of a stranger are intermingled with those of a defendant, it is his duty to make proper inquiry, with a view to avoid seizing property which is not the defendant's. He may require the claimant to point out his property, and if, being able to do so, he refuse, the officer may seize the whole, without liability to be proceeded against for a tort.[5] When, however, an officer having an attachment against A., undertakes to levy it on property in the hands of B., upon the assumption that B.'s title is fraudulent, and that the property is really A.'s; and the goods he seeks to reach are intermingled with others of a similar kind, which, without dispute, belong to B.; he cannot demand of B. to select what is undisputedly his; and a refusal by B. to make such selection, will not justify an attachment of the whole; unless B. made the intermixture fraudulently, and with the intention of frustrating the attachment.[6]

To justify an attachment of the goods of a stranger, on the

[1] Ryder *v.* Hathaway, 2 Pick. 298; Willard *v.* Rice, 11 Metcalf, 493; 2 Kent's Com. 364; Story on Bailments, § 40; Beach *v.* Schmultz, 20 Illinois, 185; Robinson *v.* Holt, 39 New Hamp. 557; Taylor *v.* Jones, 42 Ibid. 25. In Smith *v.* Sanborn, 6 Gray, 134, the court said: "A change of ownership does not necessarily ensue from the mere intermixture of property belonging to different individuals. Their rights as owners may remain unaffected after it has taken place. Each one of them is still at liberty to reclaim what had before belonged to him, if it can be distinguished and separated from the rest; or may insist on receiving his just proportion of the whole, when the several parcels of which it consists, though they have become indistinguishable, are of substantially the same quality and value. It is only in those cases where the intermixture has been caused by the wilful or unlawful act of one of the proprietors, and the several parcels have thereby become so combined or mingled together that they can no longer be identified, that his interest in them is lost."

[2] Beach *v.* Schmultz, 20 Illinois, 185.

[3] Loomis *v.* Green, 7 Maine, 386; Wilson *v.* Lane, 33 New Hamp. 466; Robinson *v.* Holt, 39 Ibid. 557.

[4] Bond *v.* Ward, 7 Mass. 123; Lewis *v.* Whittemore, 5 New Hamp. 364; Wilson *v.* Lane, 33 Ibid. 466.

[5] Sawyer *v.* Merrill, 6 Pick. 478; Albee *v.* Webster, 16 New Hamp. 362.

[6] Treat *v.* Barber, 7 Conn. 274.

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ground of intermixture, it is incumbent on the officer to show that the goods were of such character, or, at least, that there was such an intermixture, that they could not, upon due inquiry, be distinguished from those of the defendant.[1]

The necessity for inquiry in such cases is, with great propriety, very strongly insisted on by the courts, particularly in cases where the officer has a reasonable ground to induce a belief, that, in executing the writ, he may seize the property of a stranger, who is not present to assert his rights, and does not know of the seizure. Therefore, where an officer, under such circumstances, made no inquiry at all, and there was strong internal evidence, in the manner of his advertising the property for sale, that he must have been apprised that there was a defect in the defendant's title; it was held, that the owner might maintain trespass against him for taking the property.[2]

When a third party claims that his goods are intermingled, and have been attached, with those of the defendant, and exhibits to the officer a bill of sale of articles, and there are other articles of a like kind attached, so as that those of the claimant are undistinguishable, the officer will be justified in selecting and giving up the least valuable articles corresponding with the bill of sale.[3]

§ 200. An officer having an attachment may enter the store of a third person where goods of the defendant are, for the purpose of executing the writ, and may even break open the door, if refused admittance on request, and may remain there long enough to seize, secure, and inventory the goods; and if the owner of the store resist or oppose him, he may use whatever force is necessary to enable him to perform his duty.[4] In every such case a demand for admittance must precede any resort to force. If the demand be made upon the person having the key of the building, it is all that is necessary; and the officer is not bound to inquire how, or in what way, such person became possessed of the key.[5] But if, in such case, the officer take entire possession of the building, ex-

[1] Walcott v. Keith, 2 Foster, 196; Wilson v. Lane, 33 New Hamp. 466.

[2] Sibley v. Brown, 15 Maine, 185; Smith v. Sanborn, 6 Gray, 134; Carlton v. Davis, 8 Allen, 94; Gilman v. Hill, 36 New Hamp. 311.

[3] Shumway v. Rutter, 8 Pick. 443.

[4] Fullerton v. Mack, 2 Aikens, 415; Platt v. Brown, 16 Pick. 553; Burton v. Wilkinson, 18 Vermont, 186; Messner v. Lewis, 20 Texas, 221.

[5] Burton v. Wilkinson, 18 Vermont, 186.

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cluding the owner, he may, as respects the owner, be regarded as a trespasser *ab initio*.[1] When, however, the matter of forcing an entrance into a dwelling-house, for the purpose of attaching property of the owner, is presented, the law takes different ground, and not only declares such forcing an unlawful act, but that the attachment made by means of it is unlawful and invalid.[2] And this was held to apply to the case of a party living in a tenement-house, which was let in distinct portions to several tenants, who used in common the entry and stairway. It was decided that, in such case, an officer who has entered through the outer door into the entry, has no right to break open the door of one of the rooms of a tenant, in order to attach the property of a third person therein.[3] But in Vermont, if the property of a stranger be secreted in a dwelling-house, it is held, that the officer may proceed as in the case of a store.[4]

§ 201. In a case which came up in Maine, it was attempted to establish the doctrine that an officer who levies an attachment on property of greater amount in value than the debt to be secured, transcends his authority, and becomes a trespasser *ab initio*, and therefore that the attachment is invalid. But the court held, that it did not necessarily follow that the officer acted oppressively or illegally, because he attached more property than was necessary to satisfy the attachment; that if he acted oppressively, he might be liable to an action by the party injured; but that third persons could not interpose and claim to set aside the attachment for that cause.[5]

§ 202. An officer should not do any act, at the time of making an attachment, which could be construed into an abandonment of the attachment, or the attachment will be a nullity. Thus, where an officer having an attachment, got into a wagon in which the defendant was riding, and told the defendant that he attached the horse harnessed to the wagon, and then rode down street with the defendant, without exercising any other act of possession, and left the horse with the defendant, upon his promising to get a receipter

[1] Fullerton *v.* Mack, 2 Aikens, 415; Newton *v.* Adams, 4 Vermont, 437.
[2] Ilsley *v.* Nichols, 12 Pick. 270; People *v.* Hubbard, 24 Wendell, 369.
[3] Swain *v.* Mizner, 8 Gray, 182.
[4] Burton *v.* Wilkinson, 18 Vermont, 186.
[5] Merrill *v.* Curtis, 18 Maine, 272.

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for it; it was held, that, as the horse had not been under the officer's control for a moment, or, if it could be considered that he had had an instantaneous possession, it was as instantaneously abandoned, there was no attachment.[1]

§ 203. A question here arises, as to the right of an attaching officer to use the property attached, and the consequences to him of such use. It is held in Vermont, that if he use the property — as, for instance, a horse — sufficiently to pay for its keeping, he cannot require pay for such keeping;[2] and the court there seemed to regard such use as perhaps admissible to that extent; but as an unsafe and pernicious proceeding, not to be countenanced.[3] Aside from this question, however, there can be no doubt that if the officer, or his bailee, use the property, so that its value is thereby impaired, he becomes by such use a trespasser *ab initio*.[4] But the doctrine does not appear to have been extended to any case, except where there has been a clear, substantial violation of the owner's rights, and of such a character as to show a wanton disregard of duty on the part of the officer, or his bailee, either where the property has been injured, or has been used by an officer for his own benefit, or for the benefit of some other than the attachment debtor. Therefore, where an officer attached a horse, wagon, and harness, and immediately put them to use in removing other personal property of the debtor, attached by him at the same time, and it appeared that they were not thereby injured, it was held, that for such use he was not liable as a trespasser *ab initio*. And where it appeared that the officer was seen driving the horse along the highway, the next day after the attachment, and there was no proof of the purpose of such driving, it was considered that it should not be presumed to have been for an unlawful purpose.[5]

§ 204. The officer having duly levied the attachment, his next duty is to make return of it; for it is held that, though he may retain the property till the return day of the writ, without making

[1] French *v.* Stanley, 21 Maine, 512.
[2] Dean *v.* Bailey, 12 Vermont, 142.
[3] Lamb *v.* Day, 8 Vermont, 407.
[4] Lamb *v.* Day, 8 Vermont, 407; Briggs *v.* Gleason, 29 Ibid. 78; Collins *v.* Perkins, 31 Ibid. 624.
[5] Paul *v.* Slason, 22 Vermont, 231.

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his return, yet that the making of a written return is necessary to perfect the attachment, and if it be not made on or before the return day, the attachment will be dissolved.[1] This return can be made only by the officer to whom the writ was directed. A return made by another officer is void.[2] And as his return is in general conclusive against him, and cannot be disproved by parol evidence,[3] it is important, not only to all parties interested, but to himself, that it should be made with great care. In a case which came up in Maine, the court use this language: "Officers ought to know what they attach, and to be holden to exactness and precision in making their returns. Neither the debtor nor the creditor would be safe if it were otherwise. And it is well that the law should be so promulgated and understood. An officer in such cases is intrusted with great power. He may seize another man's property, without the presence of witnesses, whether it be goods in a store, or elsewhere; and safety only lies in holding him to a strict, minute, and particular account. To hold that he may, indifferently, make return of his doings at random, and afterwards be permitted to show that what he actually did was entirely different, would be opening a door to infinite laxity and fraud, and mischiefs incalculable." The court, acting on these views, held, where the officer had returned an attachment of 175 yards of broadcloth, and was sued for not having the cloth forthcoming on execution, that he could not give evidence that he had attached all the broadcloths in the defendant's possession; that the whole of the broadcloths so attached amounted to no more than thirty yards; and that by mistake he over-estimated the number of yards in the lot.[4]

§ 205. The return should state specifically what the officer has

[1] Wilder *v.* Holden, 24 Pick. 8; Russ *v.* Butterfield, 6 Cushing, 242; Williams *v.* Babbitt, 14 Gray, 141; Tomlinson *v.* Stiles, 4 Dutcher, 201; s. c. 5 Ibid. 426. In Alabama, however, in the case of an ancillary attachment — which is an attachment taken out in a suit previously instituted by summons — it was held, that the failure of a sheriff, without the connivance or consent of the plaintiff, to return such an attachment until after judgment, did not affect the plaintiff's lien. Reed *v.* Perkins, 14 Alabama, 231. And in South Carolina, a sheriff who had neglected to make his return in proper time, was allowed to make it afterward *nunc pro tunc*. Bancroft *v.* Sinclair, 12 Richardson, 617.

[2] Olney *v.* Shepherd, 8 Blackford, 146.

[3] Paxton *v.* Steckel, 2 Penn. State, 93; French *v.* Stanley, 21 Maine, 512; Haynes *v.* Small, 22 Ibid. 14; Denny *v.* Willard, 11 Pick. 519; Brown *v.* Davis, 9 New Hamp. 76; Clarke *v.* Gary, 11 Alabama, 98; Chadbourne *v.* Sumner, 16 New Hamp. 129.

[4] Haynes *v.* Small, 22 Maine, 14; Clarke *v.* Gary, 11 Alabama, 98

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done; and, where the manner of doing it is important, it should be set forth, that the court may judge whether the requirements of the law have been complied with. It does not answer for the officer, in such case, to return that he attached; he should return his doings, and leave the court to determine whether they constituted an attachment.[1] Neither should he return that he executed the writ as the law directs; for that is but his opinion of his own acts.[2] But where the officer returned that he had "levied" the writ on certain personal property, it was held, that the term could only mean a legal levy, which included a seizure of the property.[3] And where the statute required the officer to summon debtors of the defendant as garnishees, it was held that a return in the words "Garnisheed D. M. M." was sufficient.[4]

§ 206. But though an officer's return is in general conclusive against him, yet where it states a thing which, from the nature of the case, must be a matter of opinion only, it has been held that he is not concluded by it, but may explain it by parol evidence. Thus, where the return affixes a value to the goods levied on, the sheriff will not be concluded by it;[5] but it will be held, as against him, to be *primâ facie* a just and fair valuation, and the *onus* will rest on him to establish the contrary.[6] So, where a sheriff returned that he had attached certain goods, at the hour of five o'clock; it was held, that the return was *primâ facie* indicative of the true time, and might, if no other standard could be found, be conclusive on him; but that it was impossible for the sheriff to know, from his judgment or his watch, that five o'clock was the exact period of the levy, and his opinion on this point, unnecessarily returned, ought not to be considered as a conclusive averment of fact, but might be explained by parol testimony showing the moment when the levy took place.[7]

§ 207. It is proper that the return should state that the prop-

[1] Gibson *v.* Wilson, 5 Arkansas, 422.

[2] Stockton *v.* Downey, 6 Louisiana Annual, 581; Page *v.* Générès, Ibid. 549; Desha *v.* Baker, 3 Arkansas, 509; Crisman *v.* Swisher, 4 Dutcher, 149.

[3] Baldwin *v.* Conger, 9 Smedes & Marshall, 516.

[4] Bryan *v.* Lashley, 13 Smedes & Marshall, 284. *Sed contra*, Desha *v.* Baker, 3 Arkansas, 509.

[5] Denton *v.* Livingston, 9 Johns. 96.

[6] Pierce *v.* Strickland, 2 Story, 292.

[7] Williams *v.* Cheesborough, 4 Conn. 356.

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erty levied on was the property of the defendant. Whether the absence of such a statement would invalidate the levy, is not certain. In Virginia, Kentucky, and Missouri it has been decided, that an attachment of personal property without saying whose it is, is bad;[1] and in Iowa the same ground is taken as to an attachment of real estate.[2] But in Alabama it was held, that in such case it will be intended that the property, whether real or personal, was the defendant's;[3] and so in New York, in regard to personal property.[4] Where an attachment issued against Charles G. Miller, William J. Wright, and Thomas R. Crews, and was returned "levied on four bags marked T. R. C., also twenty-one bags, W. J. W., also fifteen bags marked C. G. Miller, as the property of the defendants, it was held that the return sufficiently showed that the property levied on was the property of the defendants.[5]

§ 208. By the general principles of law, independent of any statutory regulation, the officer is bound to give, as nearly as it can reasonably be done, in his return, or in a schedule or inventory annexed thereto, a specific description of the articles attached, their quantity, size, and number, and any other circumstances proper to ascertain their identity.[6] If he give such description in his return, it is not necessary that he should accompany it with a separate schedule, though the statute require him to return the writ, "with his return indorsed thereon, and a schedule of the property attached."[7] It does not seem, however, that any more precision should be exhibited in the return, than is necessary for the identification of the property. Hence, where a sheriff returned an attachment of four horses (describing their color), as the property of the defendant, it was held sufficient.[8] So, where an officer returned that he had attached all the "stock of every kind" in a woollen factory particularly described, specifying the stock as a

[1] Clay v. Neilson, 5 Randolph, 596; Mason v. Anderson, 3 Monroe, 293; Anderson v. Scott, 2 Missouri, 15.

[2] Tiffany v. Glover, 3 G. Greene, 387.

[3] Bickerstaff v. Patterson, 8 Porter, 245; Lucas v. Godwin, 6 Alabama, 831; Thornton v. Winter, 9 Ibid. 613.

[4] Johnson v. Moss, 20 Wendell, 145.

[5] Miller v. McMillan, 4 Alabama, 527.

[6] Pierce v. Strickland, 2 Story, 292; Baxter v. Rice, 21 Pick. 197; Haynes v. Small, 22 Maine, 14; Toulmin v. Lesesne, 2 Alabama, 359.

[7] Pearce v. Baldridge, 7 Arkansas, 413.

[8] Gary v. McCown, 6 Alabama, 370; Wharton v. Conger, 9 Smedes & Marshall, 510.

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"lot of dye-wood and dye-stuff," — "lot of clean wool," — "sixteen pieces of black, Oxford mixed cassimere," — "twenty-five pieces doeskins and tweeds," — "fifty-one pieces of unfinished cloth," — "lot of cotton wool," — "lot of colored wool," — "cotton wool, oils," &c., "in said woollen factory," — the return was held sufficient.[1] But a return of an attachment of "a stock of goods, wares, and merchandise," without any specification thereof, either in the return or in an annexed schedule, was held insufficient.[2] A failure to specify the articles attached, will, however, subject the officer to nominal damages only, unless special damage be shown;[3] and will not in any case authorize the attachment to be quashed.[4]

§ 209. Unless required by statute, it is no part of an officer's duty to affix a valuation to the property he attaches.[5] We have just seen that the statement of a valuation will, however, be *primâ facie* evidence, as against him, of its own correctness.[6] The omission to affix a value, when he is not bound to state it, can hardly in any case prejudice the officer. In such an extreme case, however, as arose in Maine, where there was an entire absence of all evidence of the value of the property, it would probably be held, as it was there, that the property was of the value commanded to be attached.[7]

§ 210. Where an officer is a party either claiming or justifying under his own official acts, his return must be received as evidence; otherwise it would be impossible, in most cases, to prove an attachment of property on *mesne* process, or its seizure on execution. The officer might produce his precept and show his return upon it, but if this be not *primâ facie* evidence, he could never prove the attachment, unless he took, or happened to have with him, a witness to prove the truth of his return. It may therefore be laid down as an unquestioned rule, that the returns of sworn officers, acting within the sphere of their official duty, are always competent evidence, and are to be presumed to be correct, until the contrary be shown.[8] In New Hampshire it is held, as between the

[1] Ela *v.* Shepard, 32 New Hampshire, 277.
[2] Messner *v.* Lewis, 20 Texas, 221.
[3] Bruce *v.* Pettengill, 12 New Hamp. 341.
[4] Green *v.* Pyne, 1 Alabama, 235.
[5] Pierce *v.* Strickland, 2 Story, 292.
[6] Ante, § 206.
[7] Childs *v.* Ham, 23 Maine, 74.
[8] Bruce *v.* Holden, 21 Pick. 187; Sias *v.* Badger, 6 New Hamp. 393; Nichols *v*

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officer and a trespasser, that an officer's return of an attachment of personal property, is equivalent to a return of all the facts and acts done, which are required to constitute a valid attachment, and is conclusive of the fact, and cannot be disproved by parol evidence.[1] And so, in Maine, where in an action of replevin against him, he sets up the attachment as a defence.[2]

§ 210 *a*. An officer who justifies the taking of property under an attachment, must show that the attachment was actually returned at the time when it was, by law, returnable. If the action against him be brought, and a trial therein had, before the writ under which he acted is returnable, the production of the writ, with his return thereon, will be sufficient, because he is the proper custodian of the writ until the return day. But if he fails to make his return in the time required by law, he cannot justify under it, whether the action be brought before or after the return day.[3]

§ 210 *b*. Where an officer justifies under an attachment, a misdescription in his return of an article of personal property attached by him will not vitiate the attachment, if the appearance and use of the article are such that it may have been naturally and in good faith so misdescribed. And this is not a question of law to be decided by the court, but of fact to be tried by a jury.[4]

§ 211. When an attachment has been returned, the return is beyond the reach of the officer and of the court into which it is made, unless a proper case be presented for the court to grant leave to amend it. The court will not order a return to be set aside, upon the application of a party to the cause, on his averring its incorrectness;[5] nor can a court, where one tract of land is attached, and so returned, require the officer, by rule, to substitute a different tract.[6]

§ 212. As a general proposition, every court may allow amend-

Patten, 18 Maine, 231; Polley *v.* Lenox Iron Works, 4 Allen, 329; Chadbourne *v.* Sumner, 16 New Hamp. 129.

[1] Brown *v.* Davis, 9 New Hamp. 76; Lathrop *v.* Blake, 3 Foster, 46.

[2] Smith *v.* Smith, 24 Maine, 555.

[3] Russ *v.* Butterfield, 6 Cushing, 242; Williams *v.* Babbett, 14 Gray, 141.

[4] Briggs *v.* Mason, 31 Vermont, 433.

[5] Maris *v.* Schermerhorn, 3 Wharton, 13.

[6] Steinmetz *v.* Nixon, 3 Yeates, 285.

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ments of returns upon its process. All applications for the exercise of this power are addressed to the sound legal discretion of the court, to be determined by the nature and effect of the proposed amendment;[1] and being so, a refusal to allow an amendment will not be error.[2] And though amendments may be allowed, which, on consideration, may appear of doubtful expediency, yet if they are permitted in the legal exercise of a discretion, their propriety will not in general be questioned on exceptions. But if the amendment be one which the law does not authorize, it is otherwise.[3] The exercise of this discretion is, in the absence of power conferred by statute, confined to the court out of which the process issued; therefore a superior court has no right, on a trial before it, to permit a return made to an inferior court to be amended.[4]

§ 213. An officer cannot, as a matter of *right*, amend a return he has once duly made. This would be to place at his discretion the verity and consistency of records, and the effect and authority of the most solemn judgments.[5] But until the process is actually deposited in the clerk's office, the return does not become matter of record, even though the officer keep the process in his possession long after the time when it should be returned; and until the return is actually made, the process is under his control and in his power, and he does not need the authority of the court to amend it.[6]

§ 214. If the amendment is sought in a mere matter of form, such as affixing the signature of the officer to a return already written out, but which by oversight was not signed, there can be no good reason why it should not be allowed.[7] And where the mistake is a mere slip of the pen, manifest on the face of the record, and concerning which no party who examined the record

[1] Miller *v.* Shackleford, 4 Dana, 264; Fowble *v.* Walker, 4 Ohio, 64; Palmer *v.* Thayer, 28 Conn. 237.

[2] Planters' Bank *v.* Walker, 3 Smedes & Marshall, 409.

[3] Fairfield *v.* Paine, 23 Maine, 498.

[4] Smith *v.* Low, 2 Iredell, 457; Harper *v.* Miller, 4 Ibid. 34; Brainard *v.* Burton, 5 Vermont, 97.

[5] Miller *v.* Shackleford, 4 Dana, 264; Palmer *v.* Thayer, 28 Conn. 237. In Morris *v.* Trustees, 15 Illinois, 266, it was held that amendments by sheriffs of their returns are of course.

[6] Welsh *v.* Joy, 13 Pick. 477.

[7] Dewar *v.* Spence, 2 Wharton, 211; Childs *v.* Barrows, 9 Metcalf, 413. In Tennessee it was held, that the endorsement of the sheriff's return on the writ without his signature was a good levy. Lea *v.* Maxwell, 1 Head, 365.

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could doubt, the officer will be allowed to amend, even after final judgment in the cause.[1]

§ 215. When an amendment is allowed, it relates, as between the parties to the suit, to the time when the original return was made;[2] and the amendment and the original will, if necessary to a proper understanding of the doings of the officer, be considered as one return.[3]

§ 216. There are numerous decisions bearing upon the subject of amendments of returns on *final* process, which may have more or less analogy to the subject now before us; but it is deemed advisable to consider here only those which refer to *mesne* process. In Mississippi, it is held to be error to permit a sheriff to amend his return, after judgment,[4] or after the return term of the writ, without notice to the adverse party.[5] In Virginia, it has been decided that the court ought to permit a sheriff to amend his return upon a writ of *ad quod damnum*, at any time before judgment on it;[6] and in Kentucky, a like amendment was allowed several years after the writ was executed, there being the inquest to amend by.[7] In Kentucky, a sheriff may amend his return of an attachment, so as to show that the effects attached were the property of the defendant, as well before as after judgment, and at a subsequent term;[8] and may amend his return on a petition and summons, after a writ of error is sued out to reverse the judgment.[9] In Massachusetts, an amendment in one case was allowed after verdict;[10] and in another case, where the return stated an attachment of property, and a garnishment, but omitted to state any service upon the defendants, the Supreme Court, after a writ of error was sued out to reverse the judgment, continued the case until an application could be made to the inferior court for leave

[1] Johnson *v.* Day, 17 Pick. 106.
[2] Smith *v.* Leavitts, 10 Alabama, 92.
[3] Layman *v.* Beam, 6 Wharton, 181.
[4] Hughes *v.* Lapice, 5 Smedes & Marshall, 451.
[5] Dorsey *v.* Pierce, 5 Howard (Mi.), 173; Williams *v.* Oppelt, 1 Smedes & Marshall, 559.
[6] Bullitt *v.* Winston, 1 Munford, 269; Dawson *v.* Moons, 4 Ibid. 535; Baird *v.* Rice, 1 Call, 18.
[7] Gay *v.* Caldwell, Hardin, 63.
[8] Mason *v.* Anderson, 3 Monroe, 293; Malone *v.* Samuel, 3 A. K. Marshall, 350.
[9] Irvine *v.* Scobee, 5 Littell, 70.
[10] Johnson *v.* Day, 17 Pick. 106.

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for the officer to amend his return; intimating that the inferior court had the power to grant the leave.[1] But after the case had gone back to the inferior court, which refused to allow the amendment, the Supreme Court declined to interfere, because the matter was peculiarly within the discretion of the inferior court.[2] In Maryland, where a sheriff erroneously made a return of *cepi corpus*, upon a writ of attachment, he was allowed, six years afterwards, to amend the return.[3] In Alabama, a return may be amended, after demurrer.[4] Where an officer made a minute on the writ of the time and mode of service, he was permitted, in Massachusetts, after he went out of office, and after the case had gone into the appellate court, to complete his return from his minutes on the writ.[5] But in Connecticut, where a sheriff attached goods, which were subject to a previous attachment, and the court out of which the process issued allowed him, after he went out of office, to amend his return, by adding to it that he attached the property subject to a prior attachment, it was held by the Supreme Court that the amendment could not be made; not only because no notice to the parties was given of the motion to amend, but because the returning officer was no longer in office.[6]

§ 217. In all cases where application is made for leave to amend a return, there should be something to amend by, though this may not be required by every court to which such applications are addressed. In the case previously referred to in Massachusetts, where the cause was continued by the Supreme Court to give time for an application to the inferior court for leave to amend the return, one of the reasons assigned for not interfering with the refusal of the inferior court to allow the amendment, was, that there was nothing to amend by, but the affidavit of the officer. The court said: "At the same term in which a precept is returnable, to correct a mistake or omission, may be highly proper; but for an officer to undertake, six years after a defective return, to know with certainty the performance of a particular duty, when he is daily and hourly performing similar duties upon different persons, is more than can be expected of men, however strong their memory. In the cases cited, where amendments have been

[1] Thatcher *v.* Miller, 11 Mass. 413.
[2] Thatcher *v.* Miller, 13 Mass. 270.
[3] Hutchins *v.* Brown, 4 Harris & McHenry, 498.
[4] Moreland *v.* Ruffin, Minor, 18.
[5] Adams *v.* Robinson, 1 Pick. 461
[6] Wilkie *v.* Hall, 15 Conn. 32.

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permitted, there was something on the record, by which the correction could be made; and in such cases there can be no difficulty."[1]

§ 218. Where an officer, immediately upon receiving a writ, with directions to attach certain real estate of the debtor, made a memorandum upon the writ that he attached accordingly, stating the day and month, but afterwards, by mistake, returned that he attached on the same day of the succeeding month, he was allowed to correct the error, there being something to amend by.[2] But an amendment was refused, in the date of a return, after a lapse of several years, where the officer made no minute of his doings at the time of the service.[3]

§ 219. In general, no amendment of an officer's return will be permitted, or allowed to have effect, when it would destroy or lessen the rights of third persons, previously acquired, *bonâ fide*, and without notice by the record, or otherwise. Therefore, where an officer returned on a writ of attachment, that he had attached land of the defendant, on the 6th of *June*, and afterwards, by leave of court, he was permitted to amend his return, by substituting *March* for *June*, it was held, that the amendment was not operative as against a mortgage of the land, recorded in *May*, though the evidence was sufficient to satisfy the court that the attachment was levied in *March*, and that the return, as first made, was a mistake.[4]

§ 220. But if the party who has acquired rights which would be injuriously affected by the amendment, had notice, actual or constructive, that the officer had done his duty, and that there was an omission, by mistake, in his return, which, if supplied, would perfect the officer's proceedings, or if that fact is clearly manifest on the record, he cannot avail himself of the rule above

[1] Thatcher *v.* Miller, 13 Mass. 270; Emerson *v.* Upton, 9 Pick. 167.

[2] Haven *v.* Snow, 14 Pick. 28; Gay *v.* Caldwell, Hardin, 63; Palmer *v.* Thayer, 28 Conn. 237.

[3] Hovey *v.* Wait, 17 Pick. 196; Fairfield *v.* Paine, 23 Maine, 498.

[4] Emerson *v.* Upton, 9 Pick. 167; Putnam *v.* Hall, 3 Ibid. 445; Hovey *v.* Wait, 17 Ibid. 196; Williams *v.* Brackett, 8 Mass. 240; Means *v.* Osgood, 7 Maine, 146; Berry *v.* Spear, 13 Ibid. 187; Bannister *v.* Higginson, 15 Ibid. 73; Gilman *v.* Stetson, 16 Ibid. 124; Eveleth *v.* Little, Ibid. 374; Fairfield *v.* Paine, 23 Ibid. 498; Bowman *v.* Stark, 6 New Hamp. 459; Davidson *v.* Cowan, 1 Devereux, 304; Ohio Life Ins. & Tr Co. *v.* Urbana Ins. Co., 13 Ohio, 220.

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laid down. Thus, A. sued out an attachment against B. on the 19th of November; on the next day, C. likewise obtained an attachment against B. The same attorney acted for both plaintiffs, having a full knowledge of all the facts, and directing the order of the attachments. The sheriff, in returning A.'s attachment, by mistake, dated the levy on the 19th of *December*, while he returned C.'s attachment as having been levied on the 20th of *November;* thus giving the second attachment priority over the first. At the return term of the writs, the sheriff obtained leave to amend his return on A.'s writ by inserting *November* instead of *December;* and it was held, that this amendment was effective against C., because he had, through his attorney, constructive notice that A.'s attachment was anterior in time to his.[1] So, where a writ of attachment was issued and levied on land, on the 4th of November, 1833, and was actually returned at the term next ensuing its date, and judgment was rendered at the June Term, 1834, though the sheriff returned that he had executed it on the 4th of November, 1834; it was held, that the sheriff might amend his return according to the fact, and that the amendment should be effective against a grantee of the defendant under a deed dated November 26, 1833, because the record clearly showed the mistake, and no one could by possibility be misled or injured by it.[2]

[1] Haven *v.* Snow, 14 Pick. 28.

[2] Johnson *v.* Day, 17 Pick. 106; Childs *v.* Barrows, 9 Metcalf, 413; Fairfield *v.* Paine, 23 Maine, 498.

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CHAPTER VIII.

EFFECT AND OFFICE OF AN ATTACHMENT.

§ 221. THE mere issue of an attachment has no force as against the defendant's property, either with reference to his rights, or to those of third persons, therein;[1] nor has its lodgement in the hands of an officer;[2] but its effect is to be dated from the time of its actual service.[3] And when questions arise as to the title of property claimed through an attachment, and the judgment and execution following it, the rights so acquired look back for their inception, not to the judgment, but to the attachment.[4]

§ 222. The levy of an attachment is no satisfaction of the plaintiff's demand, as that of an execution is, under some circumstances;[5] nor does it change the estate of the defendant in the property attached;[6] though to the extent of its lien, his absolute property is diminished.[7] Nor does it take away his power of

[1] Mears v. Winslow, 1 Smedes & Marshall, Ch'y R. 449; Williamson v. Bowie, 6 Munford, 176; Wallace v. Forest, 2 Harris & McHenry, 261; Tomlinson v. Stiles, 4 Dutcher, 201.

[2] Crowninshield v. Strobel, 2 Brevard, 80; Robertson v. Forrest, Ibid. 466; Bethune v. Gibson, Ibid. 501; Crocker v. Radcliffe, 3 Ibid. 23.

[3] Gates v. Bushnell, 9 Conn. 530; Sewell v. Savage, 1 B. Monroe, 260; Nutter v. Connett, 3 Ibid. 199; Fitch v. White, 5 Conn. 117; Leamed v. Vandenburgh, 8 Howard Pract. R. 77; Pond v. Griffin, 1 Alabama, 678; Crowninshield v. Strobel, 2 Brevard, 80; Robertson v. Forrest, Ibid. 466; Bethune v. Gibson, Ibid. 501; Crocker v. Radcliffe, 3 Ibid. 23; Zeigenhagen v. Doe, 1 Indiana, 296; Burkhardt v. McClellan, 15 Abbott Pract. R. 243, *note;* Tuffts v. Manlove, 14 California, 47; Haldeman v. Hillsborough & Cin. R. R. Co., 2 Handy, 101; Kuhn v. Graves, 9 Iowa, 303.

[4] Tyrell v. Rountree, 7 Peters, 464; Stephen v. Thayer, 2 Bay, 272; Am. Ex. Bank v. Morris Canal & Banking Co., 6 Hill (N. Y.), 362; Martin v. Dryden, 6 Illinois (1 Gilman), 187; Redus v. Wofford, 4 Smedes & Marshall, 579; Brown v. Williams, 31 Maine, 403; Tappan v. Harrison, 2 Humphreys, 172; Oldham v. Scrivener, 3 B. Monroe, 579; Lackey v. Scibert, 23 Missouri, 85; Hannahs v. Felt, 15 Iowa, 141; Cockey v. Milne's Lessee, 16 Maryland, 200.

[5] McBride v. Farmers' Bank of Salem, 28 Barbour, 476. *Sed contra,* Yourt v. Hopkins, 24 Illinois, 326.

[6] Bigelow v. Wilson, 1 Pick. 485; Blake v. Shaw, 7 Mass. 505; Starr v. Moore, 3 McLean, 354; Tiernan v. Murrah, 1 Robinson (La.), 443; Crocker v. Pierce, 31 Maine, 177; Wheeler v. Nichols, 32 Ibid. 233; Perkins v. Norvell, 6 Humphreys, 151; Snell v. Allen, 1 Swan, 208; Oldham v. Scrivener, 3 B. Monroe, 579; Haldeman v. Hillsborough & Cin. R. R. Co., 2 Handy, 101.

[7] Grosvenor v. Gold, 9 Mass. 209.

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transfer, either absolutely or in mortgage, subject to the lien of the attachment.[1] Nor does the attaching plaintiff acquire any property thereby.[2] Nor can he sell the property by virtue of the attachment, before judgment and execution; but can do so only under an order of court, or of the judge who issued the writ.[3] Nor has the court authority to order the attached property to be delivered to the plaintiff.[4] Therefore, where an attaching creditor, after obtaining judgment in the action, demanded the attached goods of the officer, who refused to deliver them, and the creditor thereupon sued him; it was decided, that it was not the duty of the officer, but would have been contrary to his duty, to make such a delivery; that the goods were in the legal custody of the officer, who was accountable for them; and that the general property in them was not changed until a levy and sale by execution.[5]

§ 223. It is a well-settled principle, that an attaching creditor can acquire through his attachment no higher or better rights to the property or assets attached than the defendant had *when the attachment took place*, unless he can show some fraud or collusion by which his rights are impaired. No interest subsequently acquired by the defendant in the attached property will be affected by the attachment.[6] If the property, when attached, is subject to a lien *bonâ fide* placed upon it by the defendant, that lien must be respected, and the attachment postponed to it.[7] And this rule was once held to extend to at least one description of what have been termed *silent* liens, that is, liens existing merely by operation of law. Under this view it was held by GRIER, J., on the circuit, that the sale of a ship under attachment had no effect to devest a lien in admiralty for mariners' wages.[8] But subsequently, by the

[1] Bigelow *v.* Willson, 1 Pick. 485; Denny *v.* Willard, 11 Ibid. 519; Fettyplace *v.* Dutch, 13 Ibid. 388; Arnold *v.* Brown, 24 Ibid. 89; Warner *v.* Everett, 7 B. Monroe, 262; Wheeler *v.* Nichols, 32 Maine, 233; Calkins *v.* Lockwood, 17 Conn. 154.

[2] Bigelow *v.* Willson, 1 Pick. 485; Crocker *v.* Radcliffe, 3 Brevard, 23; Willing *v.* Bleeker, 2 Sergeant & Rawle, 221; Owings *v.* Norwood, 2 Harris & Johnson, 96; Goddard *v.* Perkins, 9 New Hamp. 488; Austin *v.* Wade, Pennington, sec. ed. 727.

[3] McKay *v.* Harrower, 27 Barbour, 463.

[4] Welch *v.* Jamison, 1 Howard (Mi.), 160.

[5] Blake *v.* Shaw, 7 Mass. 505.

[6] Crocker *v.* Pierce, 31 Maine, 177.

[7] Nathan *v.* Giles, 5 Taunton, 558, 576; Baillio *v.* Poisset, 8 Martin, N. S. 337; Frazier *v.* Willcox, 4 Robinson (La.), 517; Peck *v.* Webber, 7 Howard (Mi.), 658; Parker *v.* Farr, 2 Browne, 331; Reeves *v.* Johnson, 7 Halsted, 29; Meeker *v.* Wilson, 1 Gallison, 419; Haldeman *v.* Hillsborough & Cin. R. R. Co., 2 Handy, 101.

[8] Taylor *v.* The Royal Saxon, 1 Wallace, Jr. 311.

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Supreme Court of Pennsylvania, and by that of the United States, it was decided that an attachment issued by a State court and levied upon a vessel, was not defeated by a subsequent proceeding *in rem* in Admiralty for such wages.[1]

§ 224. When an attachment is served, a lien on the property attached is created which nothing subsequent can destroy, but the dissolution of the attachment.[2] It is beyond the power of a State Legislature to pass an act destroying it.[3] And as to the defendant, though, as we have just seen, his power of alienation, subject to the attachment, is not impaired, yet no subsequent act of that description on his part can defeat the attachment.[4]

That the service of an attachment constitutes a lien, seems to have been generally conceded, until the late Justice STORY, in the course of the administration of the Bankrupt Act of 1841, expressed a different view. That distinguished jurist, in an elaborate opinion, held, that an attachment on *mesne* process is not a lien, either in the sense of the common law, or of the maritime law, or of equity; but only a contingent and conditional charge, until the judgment and levy.[5] This opinion was subsequently sanctioned and adopted by the Supreme Court of Louisiana;[6] while against it, in cases arising under the same act, we find the judgments of the Supreme Courts of Maine,[7] Massachusetts,[8] New Hampshire,[9] New Jersey,[10] and Mississippi;[11] of the District Court

[1] Taylor *v.* Carryl, 24 Penn. State, 259, s. c. 20 Howard Sup. Ct. 583.

[2] Goore *v.* M'Daniel, 1 M'Cord, 480; Peck *v.* Webber, 7 Howard (Mi.), 658; Smith *v.* Bradstreet, 16 Pick. 264; The People *v.* Cameron, 7 Illinois (2 Gilman), 468; Vinson *v.* Huddleston, Cooke, 254; Van Loan *v.* Kline, 10 Johns. 129; Desha *v.* Baker, 3 Arkansas, 509; Davenport *v.* Lacon, 17 Conn. 278; Schacklett & Glyde's Appeal, 14 Penn. State, 326; Erskine *v.* Staley, 12 Leigh, 406; Moore *v.* Holt, 10 Grattan, 284, Cary *v.* Gregg, 3 Stewart, 433; Murray *v.* Gibson, 2 Louisiana Annual, 311; Hervey *v.* Champion, 11 Humphreys, 569; Snell *v.* Allen, 1 Swan, 208; Zeigenhagen *v.* Doe, 1 Indiana, 296; Pierson *v.* Robb, 4 Illinois (3 Scammon), 139; Martin *v.* Dryden, 6 Illinois (1 Gilman), 187; Lyon *v.* Sanford, 5 Conn. 544; Lackey *v.* Seibert, 23 Missouri, 85; Hannahs *v.* Felt, 15 Iowa, 141.

[3] Hannahs *v.* Felt, 15 Iowa, 141.

[4] M'Bride *v.* Floyd, 2 Bailey, 209; Harvey *v.* Grymes, 8 Martin, 395; Bach *v.* Goodrich, 9 Robinson (La.), 391; Franklin Fire Ins. Co. *v.* West, 8 Watts & Sergeant, 350.

[5] Foster's case, 2 Story, 131; Bellows & Peck's case, 3 Ibid. 428.

[6] Fisher *v.* Vose, 3 Robinson (La.), 457.

[7] Franklin Bank *v.* Batchelder, 23 Maine, 60.

[8] Davenport *v.* Tilton, 10 Metcalf, 320.

[9] Kittredge *v.* Warren, 14 New Hamp. 509; Kittredge *v.* Emerson, 15 Ibid. 227; Buffum *v.* Seaver, 16 Ibid. 160.

[10] Vreeland *v.* Brown, 1 Zabriskie, 214.

[11] Wells *v.* Brander, 10 Smedes & Marshall, 348.

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of the United States for Vermont;[1] and of the late Justice THOMPSON, of the Supreme Court of the United States;[2] and, under the General Bankrupt Act of 1800, that of the Supreme Court of Connecticut.[3] At least three of these judgments — those in Massachusetts, New Hampshire, and New Jersey — were an immediate result of Justice STORY's ruling, and by each of those courts his opinion was fully and very ably reviewed. When to these adverse opinions we add those of the several State courts just referred to, we can have no hesitation in regarding the learned judge's views as overborne by the weight of authority.

§ 225. In connection with the lien acquired by an attaching creditor has come up, in different forms, the question of his right to secure the benefit of his lien, as against fraudulent conveyances of, and incumbrances upon, the attached property. The first shape this question assumed was, as to the attaching creditor's right to maintain a creditor's bill in equity to set aside such a conveyance or incumbrance. The doctrine that a creditor at large, before he obtains judgment, is not entitled to such a remedy, is familiar to the legal mind. "The reason of the rule," said Chancellor Kent, "seems to be, that until the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary and perhaps a fruitless and oppressive interruption to the exercise of the debtor's rights. Unless he has a *certain* claim upon the property of the debtor, he has no concern with his frauds."[4] Such, doubtless, is the general rule. That, like all general rules, it is subject to exceptions, was held by the Court of Appeals of Kentucky, in sustaining such a bill by a creditor at large, where the debtor resided or had removed out of the State, so as to prevent a judgment being obtained against him at law.[5]

[1] Downer *v.* Brackett, 5 Law Reporter, 392; Rowell's case, 6 Ibid. 300. The same cases are reported in 21 Vermont, 599 and 620.

[2] Haughton *v.* Eustis, 5 Law Reporter, 505.

[3] Ingraham *v.* Phillips, 1 Day, 117.

[4] Wiggins *v.* Armstrong, 2 Johns. Ch. 144. See Mills *v.* Block, 30 Barbour, 549.

[5] Scott *v.* McMillan, 1 Littell, 302. The views of the court were thus expressed: "Generally speaking, creditors must show themselves to be such, by obtaining judgment at law, before they will be allowed to apply to a court of equity to investigate any fraud alleged to have been committed by their debtor, in alienating his property. The necessity of thus first obtaining judgment at law, before application is made to a court of chancery, does not, however, arise from the want of jurisdiction in the court of chancery to investigate fraud; but it results from the circumstance of the demand which constitutes the creditor, being cognizable at law, and the necessity of that demand be-

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In different States the attempt has been made to establish another exception, in favor of attaching creditors. In New York, a bill in favor of such a creditor was once sustained by the Court of Chancery;[1] but this was contrary to the uniform course of decision in that State, before and since. In Illinois,[2] and Missouri,[3] the right to maintain such a bill was denied. On the other hand, New Hampshire[4] and New Jersey[5] have held, that an attachment confers a lien, in virtue of which the bill may be maintained. In New York, too, it was decided that an attaching creditor is not,

ing established by the determination of a court, acting within its legitimate sphere; and whenever the demand is so established, the court of chancery, acting within the acknowledged limits of its jurisdiction, will search out the fraud, and clear away all obstructions to the effectual execution of the judgment at law.

"Notwithstanding, however, it may, in the general, be necessary for the creditor to establish his demand at law before he applies to a court of chancery, it cannot be admitted to be indispensable in every case. Cases may occur, and the present case was of that character when the bill was filed, where, from the absence of the debtor from the country, the creditor would not be enabled to establish his demand at law. At common law, the creditor, in such a case, might perhaps establish his demand at law, by proceeding to outlaw the defendant; but in this country after a return of 'no inhabitant' on the writ, the suit is directed to abate, and after an abatement there can be no proceedings to outlawry. Possessing, therefore, no means of establishing his demand at law, it would seem the creditor ought, without first commencing an action at law, to be allowed to apply to a court of equity for relief. It is not unusual for courts of equity to entertain jurisdiction and give relief, wherever the principles by which the ordinary courts are guided in their administration of justice, give right, but from accident, or fraud, or defect in their mode of proceeding, those courts can afford no remedy, or cannot give the most complete remedy. It is upon this principle, of a defect in the mode of proceedings at law, that the jurisdiction of many causes has been translated from a court of law to a court of chancery; and if such a defect be sufficient to transfer a cause, otherwise cognizable at law, to a court of chancery, *à fortiori* should it be sufficient to authorize the chancellor to take cognizance of a case involving matter properly of equitable jurisdiction, sooner than he would have done, if no such defect in the proceedings at law existed.

"Fraud is properly cognizable in a court of chancery, as well as in a court of law; and although, when committed by debtors in conveying their property to the prejudice of creditors, the chancellor, in ordinary cases, may refuse to inquire into the fraud, until the creditor, by obtaining judgment at law, establishes the justice of his demand; yet, when the debtor, by absenting himself from the country, renders all proceedings at law against him ineffectual, the chancellor, regardless of his practice in ordinary cases, will lay hold of the property alleged to be fraudulently conveyed, examine the fraud, inquire into the justice of the creditor's demand, and finally, by acting on the *thing*, grant the appropriate relief. It is true, according to the ancient practice in chancery, no decree could be pronounced against a defendant, without the personal service of process; but we have, in this country, a statute authorizing, in all suits in chancery against absent defendants, an order for publication; and the publication, when made, is, for all purposes of trial, equivalent to the personal service of process."

[1] Falconer *v.* Freeman, 4 Sandford, Ch. 565.

[2] Bigelow *v.* Andress, 31 Illinois, 322.

[3] Martin *v.* Michael, 23 Missouri, 50.

[4] Stone *v.* Anderson, 6 Foster, 506.

[5] Hunt *v.* Field, 1 Stockton, 36, overruling Melville *v.* Brown, 1 Harrison, 363.

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before he obtains judgment, entitled to impeach the *bonâ fides* of a judgment confessed by a debtor to a third person before the attachment was levied.[1] Such is the position of this branch of the main question.

But it has come up, substantially, in another form, in the case of the attachment of personal property in the hands of a person other than the defendant, claiming it under a transfer from the defendant. In such case, can the attachment plaintiff, or the officer who levied the writ, when sued for trespass by the party claiming under the defendant's transfer, show in defence that the alleged transfer was fraudulent as against the attaching creditor? Against the right to set up such a defence, the same ground is taken as against the right of such a creditor to maintain a creditor's bill, namely, that he is only a creditor at large until he has obtained a judgment. On the other hand, it is urged that the statute relative to fraudulent conveyances is not by its terms confined to judgment-creditors; that such conveyances are void as to all creditors who elect to treat them as void by adopting the process which the law provides; that attachment, as a provisional remedy, is one of these, the command of which is the same, in substance, as that of an execution; and that a levy under it is a lien which authorizes the party claiming through it to assail, as fraudulent, transfers of the property levied on. The whole subject came under discussion before the New York Superior Court, and, after an elaborate review of the authorities, the court held, that the defence was available to an officer executing an attachment.[2] Afterwards it came before the Court of Appeals of that State, by which the same doctrine was maintained; that court holding that an attaching creditor is not to be deemed a mere creditor at large, but a creditor having a specific lien upon the property attached, and that the sheriff, as his bailee, has a like lien, and is entitled to show that a supposed sale of the attached property was fraudulent as against the attaching creditor.[3] This

[1] Bentley *v.* Goodwin, 15 Abbott Pract. R. 82; s. c. 38 Barbour, 633; Brooks *v.* Stone, 19 Howard Pract. R. 395. See Wintringham *v.* Wintringham, 20 Johns. 296.

[2] Thayer *v.* Willet, 5 Bosworth, 344; s. c. 9 Abbott Pract. R. 325. See Skinner *v.* Oettinger, 14 Abbott Pract. R. 109.

[3] Hall *v.* Stryker, 27 New York, 596; overruling the decision of the Supreme Court in the same case, as reported in 29 Barbour, 105, and 9 Abbott Pract. R. 342. And see Rinchey *v.* Stryker, 28 New York, 45, where the court adhered to its previous decision in Hall *v.* Stryker. And where it is allowed to a sheriff to dispute a claim to attached property, on the ground that the sale under which it is claimed adversely, was fraudu-

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is virtually an abandonment of the whole ground of controversy as to the right of such a creditor to maintain a creditor's bill; and throws the weight of the authority of New York in favor of a doctrine, which is too just in principle and beneficent in results, to be long overborne by the single objection that none but a judgment-creditor can maintain such a bill.

§ 226. The lien of an attachment extends only to the property which has been actually subjected to its action. It cannot constructively reach the property of one who has been summoned as garnishee. Therefore, where one who had been so summoned died, pending the proceedings against him, and his administrator was made a party to the suit as his representative, and judgment was rendered against the administrator, on account of a debt due from the intestate to the attachment defendant, it was held, that this judgment was not entitled to priority over any other debts of the intestate, as the attachment was no lien upon his effects, and the plaintiff could acquire no greater interest under the attachment proceedings, in the debt of the garnishee to the defendant, than the defendant himself would have had if no attachment had been made.[1]

§ 227. The lien of an attachment is not limited to the amount for which the writ commands the officer to attach; but is commensurate with the amount of the judgment and costs, though that be greater than the sum which the precept of the writ required the officer to secure.[2] But this is not to be understood as authorizing a judgment in the attachment suit for any other cause of action, than that for which the attachment was issued. If the plaintiff take judgment for more than was then due him, with interest, he cannot, as against other attaching creditors, sustain his attachment for the excess. Thus, where a debt was payable by instalments, one falling due in May, and one in September; and in the intervening July, an attachment was sued out on that which matured in May; and in the following December the plaintiff took judgment for *both* instalments; it was held, that, as against a

lent and void, he may, on the same ground, follow the proceeds of the property in money, where, as in New York, he is vested with a right of action to recover such property. Kelly *v.* Lane, 28 Howard Pract. R. 128.

[1] Parker *v.* Farr, 2 Browne, 331.

[2] Searle *v.* Preston, 33 Maine, 214.

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junior attacher, he could hold only the amount of the May instalment, with interest.[1]

§ 228. As the whole office of an attachment is to seize and hold property until it can be subjected to execution, its lien is barren of any beneficial results to the plaintiff, unless he obtain judgment against the defendant, and proceed to subject the property to execution. A judgment for the defendant, therefore, destroys the lien, and remits the parties to their respective positions before the attachment was levied.[2]

§ 229. An attachment takes precedence of a junior execution;[3] and a purchaser of land under an attachment, will prevail against a purchaser under a judgment obtained after the levy of the attachment, though the judgment in the attachment suit was subsequent to the other.[4] The strength of this doctrine was illustrated in a case in Pennsylvania, under a statute which declared that "Every writ of attachment executed on real estate shall bind the same *against purchasers and mortgagees*." On the 18th of January, 1847, an attachment was executed on real estate. In November, 1848, judgment was obtained in the action. In the mean time, several other creditors of the defendant sued out attachments, and caused them to be executed on the same real estate; and in all those cases the defendant confessed judgments in April, May, and June, 1848. The plaintiffs in these judgments claimed priority of the first attaching creditor, because, though their attachments were later than his, their judgments were earlier; and it was contended, on their behalf, that the lien of the

[1] Syracuse City Bank *v.* Coville, 19 Howard Pract. R. 385. The question does not appear to have been raised, whether the taking of the judgment for more than was sued for did not wholly dissolve the attachment as to subsequent attachers. Had it been, the court would hardly have hesitated to sustain it, as was done in a similar case in Michigan. Hale *v.* Chandler, 3 Michigan, 531. Such a ruling would have been fully upheld by the cases cited, post, § 282. And see Tunnison *v.* Field, 21 Illinois, 108; Austin *v.* Burgett, 10 Iowa, 302.

[2] Clap *v.* Bell, 4 Mass. 99; Johnson *v.* Edson, 2 Aikens, 299; Suydam *v.* Huggeford, 23 Pick. 465; Hale *v.* Cummings, 3 Alabama, 398.

[3] Goore *v.* M'Daniel, 1 M'Cord, 480; Van Loan *v.* Kline, 10 Johns. 129; Lummis *v.* Boon, 2 Pennington, 734; Pond *v.* Griffin, 1 Alabama, 678; Beck *v.* Brady, 7 Louisiana Annual, 1; Harbison *v.* McCartney, 1 Grant, 172.

[4] Redus *v.* Wofford, 4 Smedes & Marshall, 579; Am. Ex. Bank *v.* Morris Canal and Banking Co., 6 Hill (N. Y.), 362; Martin *v.* Dryden, 6 Illinois (1 Gilman), 187; Baldwin *v.* Leftwich, 12 Alabama, 838; Tappan *v.* Harrison, 2 Humphreys, 172; Oldham *v.* Scrivener, 3 B. Monroe, 579.

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first attachment bound the property only as against subsequent *purchasers and mortgagees;* but it was held, that though a judgment creditor was neither a purchaser nor a mortgagee, and therefore not within the letter of the law, yet he was within its equity; and the priority of the first attachment was sustained.[1]

§ 230. An attachment in the hands of one officer, levied on personal property, will take precedence of a senior execution, in the hands of another officer, who has not effected a levy.[2] Thus, where a constable seized certain property, under an attachment for a sum exceeding fifty dollars, issued by a justice of the peace, and the law required that, in such a case, he should deliver the property to the sheriff, to be sold, if required to satisfy the attachment, which was done; and the sheriff, instead of holding the property subject to the attachment, levied on it an execution that was in his hands before the attachment was levied; it was held, that this was a wrongful act, which would enable the constable to maintain replevin against the sheriff for the property.[3]

[1] Schacklett & Glyde's Appeal, 14 Penn. State, 326.

[2] Field *v.* Milburn, 9 Missouri, 492.

[3] Bourne *v.* Hocker, 11 B. Monroe, 23. The following are the views of the court: "The question in this case depends upon the question whether the levy of the attachment was lawful while there was an unlevied execution in the hands of another officer. For if a constable had a right to levy the process in his hands, we do not perceive how the sheriff could rightfully invade the possession thus lawfully acquired, or take from him the property which he had rightfully taken for the purposes of the writ in his hands, and which by his seizure was placed properly in the custody of the law. It is to prevent such an invasion of possession lawfully acquired under legal process, to remove all ground for such a struggle between independent officers of the law, and to avoid occasion for conflict between different authorities or tribunals competent to act upon the same party and the same property, that the law has established the principle that the first execution of the process in the hands of distinct officers and emanating from distinct and competent authorities, shall give the precedence. The fact that in the case of executions in distinct hands, the priority of date is held to be of no force against the priority of actual execution, shows that the principle above referred to, and the objects to be secured by it, are deemed of more consequence than the preservation or existence of the lien existing by delivery of the writ, but which standing by itself is scarcely more than nominal, and fades into nothing unless followed by an actual legal levy. An attachment is as imperative in requiring, and as efficacious in authorizing, a seizure of the defendant's goods as a *fieri facias.* And if the lien, whatever it be, of the senior execution leaves, while it is unlevied. such property or right in the defendant that a junior execution in distinct hands may not only be levied on it, but may by the first levy appropriate the property to itself, to the exclusion of the senior execution, we do not perceive on what ground the unlevied execution, or any lien attaching to it, can repel an attachment, which is a process of equal authority with itself. True, the attachment gives no lien before it is levied. But this is substantially true with respect to the junior execution, as against the older one in the hands of the officer. And it is also substantially true with respect to the older one itself, as against a junior execu-

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§ 231. Unless otherwise directed by statute, attachments take precedence, and are entitled to satisfaction, in the order, in point of time, of their service.[1]

tion in the hands of a distinct officer, acting under a distinct authority. For to say that as between them the first levy gains the precedence, is to say that as between them there is no lien until there is a levy. It seems impossible to trace this want or annihilation of the lien of each as against the other to the fact that each would have a lien but for the other, or that each has a lien except as against the other. If the lien arising from the right to levy were to be regarded, the execution first in hand must prevail. The true ground and principle of the rule applicable to the case seems to be, that the process in the hands of each officer being equally authoritative and equally imperative in its requisition to seize the property of the defendant, and each officer being independent of the other, each has a right and is bound to execute the process in his hands as speedily and as effectually as he can, and that the right and authority of each being equal, either may rightfully act without yielding to the mere authority of the other to act; but that when either has acted under the mandate of his process, and has by seizure acquired the possession, and placed the property in the custody or under the authority of the law, the other is bound to respect this possession and custody. And he cannot afterwards take the property, because it is no longer in the possession or power of the defendant, but has already been taken by competent authority, and is under the power and protection of the law, and because his subsequent seizure of it, while in the lawful possession of the first taker, would be a trespass which he is not authorized to commit. A possession derived from the act of the defendant is of course not thus protected." See Field *v.* Milburn, 9 Missouri, 492.

[1] Robertson *v.* Forrest, 2 Brevard, 466; Crowninshield *v.* Strobel, Ibid. 80; Emerson *v.* Fox, 3 Louisiana, 183; Atlas Bank *v.* Nahant Bank, 23 Pick. 488; Wallace *v.* Forrest, 2 Harris & M'Henry, 261; Talbot *v.* Harding, 10 Missouri, 350; Farmers' Bank *v.* Day, 6 Grattan, 360.

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CHAPTER IX.

ATTACHMENT OF REAL ESTATE.

§ 232. It would be inconsistent with the scope and design of this work to set forth the law of each State as to the interests in real estate which are subject to attachment. It may be stated, however, that the general principle, which confines the right of attachment of tangible property to such interests therein, or descriptions thereof, as can be sold, or otherwise made available, under execution, to satisfy the plaintiff's demand, applies as well to real as personal property.

§ 233. Whether real estate can be attached, when the defendant has sufficient personal property, accessible to the officer, out of which to make the debt, must, in like manner, depend on the law of each State, and the peculiar phraseology of the writ under which the officer acts. It may be considered a sound doctrine, that, in the absence of any positive limitation of the right of attachment, real estate may be as well attached as personalty; and that the existence within the knowledge of the officer of a sufficiency of the latter, which he might seize, will not invalidate an attachment of the former. This was so held, where a statute existed directing attachments to be served by attaching the goods or chattels of the defendant, or if none could be found, by attaching his person or land.[1]

§ 234. Another established principle affects with peculiar fitness attachments of real estate, — that the attachment can operate only upon the right of the defendant existing when it is made. If, prior to the attachment, he had sold and conveyed the land, in good faith, but the vendee did not put the deed on record until afterward, but did so before a sale of the land under execution, it cannot be held for the debt of the vendor.[2] Nor, on the other hand, can any interest which the defendant subsequently acquires

[1] Isham *v.* Downer, 8 Conn. 282; Weathers *v.* Mudd, 12 B. Monroe, 112.
[2] Cox *v.* Milner, 23 Illinois, 476.

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be reached by it. This principle was applied in the following case. The Commonwealth of Massachusetts, in 1832, gave a bond for title to real estate to P., and in August, 1836, executed to him a deed in pursuance of the bond. Prior to the last-named date, P. conveyed by deed of warranty an interest in the lands, to parties from whom, by intermediate conveyances, that interest came to be vested in S. In 1835, S. conveyed by warranty deed to C., but the deed was not recorded till 1839. In May, 1836, that interest was attached as the property of S., and sold in 1841, under the execution in the attachment suit, and bought by P., the original obligee in the bond from Massachusetts. The question of title came up in a suit by C. against P. for a proportionate part of the value of timber cut by the latter from the land. On behalf of C. it was claimed, that the title made by Massachusetts in 1836, enured to C.'s benefit, by virtue of the various conveyances, with warranty, beginning with that from P. and ending with that from S. to C. On the other hand, it was urged in support of P.'s title that the attachment through which he claimed, having been laid on the land before the deed from S. to C. was recorded; and therefore before it could take effect against the attachment plaintiffs, by its registry, gave to the attachment plaintiffs the same title which would have enured to them, by the doctrine of estoppel, if they had held under a deed with covenants of warranty recorded at the time of the attachment, and that their right passed to P. This claim on behalf of P. was repudiated by the court in these terms: "The purpose of an attachment upon *mesne* process is simply to secure to the creditor the property which the debtor has at the time it is made, so that it may be seized and levied upon in satisfaction of the debt, after judgment and execution may be obtained. The title to the property remains unchanged by the attachment.

"An attachment can operate only upon the right of the debtor existing at the time it is made. No interest subsequently acquired by the debtor can in any manner be affected by the return thereof, when none was in him at the time.

"We have been directed to no case, and it is believed that none can be found, where a title has been held to enure to a creditor from an attachment upon a writ by way of estoppel, as from a deed, with covenants of warranty, where there is no title of the debtor upon which the attachment can operate. Upon the prin-

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ciple contended for, it would be in the power of a creditor, by a return of an attachment upon *mesne* process, to secure to himself any interest in real estate which his debtor might obtain subsequently thereto, if the interest should be attachable.

"At the time the attachment was made, S. had no title whatever in the land, nor had he seizin or possession. If he had made no conveyance till the title had passed from the Commonwealth of Massachusetts to P., the attachment would be entirely without effect against him, but the title of the Commonwealth would enure to his benefit alone. The levy of an execution at the same time would be a nullity, and the return of full satisfaction thereon would not prevent the issue of a new execution upon *scire facias*. When the levy was made upon the execution obtained from the judgment recovered, the title had passed from the Commonwealth of Massachusetts to P., and the same enured to S., and instantly to C."[1]

§ 235. The question has frequently arisen, whether a mortgagee of real estate has an attachable interest therein. It has been held by courts in several States, that, before an entry for condition broken, with a view to foreclosure, such interest cannot be taken in satisfaction of a judgment and execution against him. This doctrine has been so frequently discussed and reaffirmed, that it may be considered fully established. Whether his interest is so changed by such entry, that it becomes attachable, is a question which does not appear to have been distinctly presented for adjudication, except in Maine. In several opinions, courts had carefully limited the doctrine to the cases before them, where there had been no entry for a breach of the condition, or when the mortgagor was in possession; and in others, they intimated, in terms far from implying doubts, that the respective rights of the parties to a mortgage were not materially changed by the entry of the mortgagee. Before the Supreme Court of Maine, however, the question was broadly presented, and after a full and careful examination, it was decided that the interest of a mortgagee cannot be attached any more after entry than before.[2]

[1] Crocker *v.* Pierce, 31 Maine, 177.

[2] Smith *v.* People's Bank, 24 Maine, 185; Lincoln *v.* White, 30 Ibid. 291; Thornton *v.* Wood, 42 Ibid. 282. The views of the court were thus expressed, in the first of these cases: "The result is to be drawn from the principles which we have consid

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§ 236. The requisites of an attachment of real estate are generally determined by statute. Where, however, that is not the case, the rule which has obtained in Maine and Massachusetts would probably be received and applied, — that it is not necessary for the officer to go upon the land, or into its vicinity, or to see it, or do any other act than make return upon the writ that he had

ered, that the breach of the condition in a mortgage in no respect changes the nature of the estate in the respective parties. Notwithstanding such breach, the mortgagor is still considered the owner against all but the mortgagee; he may sell and convey the fee; may lease the land, if in possession; and in every respect deal with it as his own. The equity of redemption remains little, if at all, affected by an entry of the mortgagee, after breach of the condition; the rights of the mortgagor are not essentially impaired till foreclosure. It may be taken on execution against the owner and disposed of as well after as before such entry; and the interest acquired by the creditor differs in no respect from that which he would have obtained, if made before breach of condition. The mortgagee, by his entry, acquires no absolute interest presently, which he would not have done by taking possession before the breach of the condition. In both cases he would hold the land subject to redemption, and be obliged to account strictly for the net value of the rents and profits; if they should be equal to the amount of the debt secured by the mortgage, before the expiration of the time necessary to work a foreclosure, the mortgage would be discharged thereby as effectually as by any other mode of payment. In the view of a court of equity, the rents and profits are incidents *de jure* to the ownership of the equity of redemption. In no sense can they be the property of the mortgagee, till foreclosure. He surrenders no rights which he before possessed by the entry. In the language of Chief Justice SHAW, in Fay *v.* Cheney, 14 Pick. 399, 'the entry does little or nothing to change the relative rights of the parties. It fixes the commencement of three years, the lapse of which, by force of law, if the estate be not redeemed, will work a foreclosure.' Until that takes place, the mortgage is, as before, a security for the debt, and remains the personal property of the mortgagee, passing on his death to the executor and not to the heir. No new property is added to it by entry, which did not previously belong to it, so as to make it liable for the debts of the mortgagee. All the difficulties and inconveniences, which would result from a levy of an execution upon such an estate, before entry, would exist in even a greater degree afterwards. In addition to the fact, that an execution might require but a small part of the land to satisfy it, and several levies might be made by several persons, which would be an embarrassment to the mortgagor, or his representative, if they should wish to redeem, there would be the greater difficulty arising from the rents and profits, for the value of which the latter would be entitled. In such a case, who would be held to account for them, a part having been received by the mortgagee, and a part by several creditors, who might claim to succeed to his right as the mortgagee? Against whom must the mortgagor bring his bill in equity, that he may be restored to his estate? Was it supposed that by the acts of strangers he should be turned from the plain and straight course of seeking his equities from the mortgagee and his assigns? To whom must the tender be made to entitle the owner of the equity of redemption to the rights secured to him by law? But a difficulty greater than inconveniences presents itself as an insurmountable obstacle to the levy upon a mortgagee's right before foreclosure. The mortgage is a 'pledge,' 'a *chose in action*,' 'an accident' until foreclosure. Such cannot be taken and sold on execution, unless by express statute provision, much less if possible, can it be the subject of levy by a set-off. If the interest of a mortgagee cannot be taken in satisfaction of an execution, it cannot be the subject of attachment upon *mesne* process. No attachment can be made, where there is no right of the debtor which is attachable." See Courtney *v.* Carr, 6 Iowa, 238

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attached it.[1] He has no right to take actual exclusive possession of the property, or in any way to disturb the possession of the occupants.[2]

§ 237. In making such return, a distinction is taken between the levy of an attachment, which is a mere lien on the property, and the levy of an execution, by which, when carried to a sale, the defendant's property is devested. In the latter case greater precision is required than in the former. Hence it has been considered, in the case of an attachment, that any words which clearly designate and comprehend the property attached, are sufficient.[3] In such case, too, the generality of the description makes no difference, if it be sufficiently intelligible to fix the lien of the process. *Id certum est quod certum reddi potest*, and, therefore, if the land be at all intelligibly indicated, the application of this principle will remove objections that might exist on the score of imperfection in the description.[4] It has, therefore, been held, that a return of an attachment of the defendant's interest in the farm he lives on is sufficient.[5] So, an attachment of all the defendant's interest in "a certain parcel of land situate on Pleasant Street in Boston," will suffice, if the defendant was interested in only one parcel on that street.[6] And where an officer returned that he had "attached the homestead farm of the defendant, containing about thirty acres, more or less"; it was held, that this was a sufficient description of the farm, although in fact it contained about 150 acres; the statement of the number of acres being rejected as a mistake in the officer, or as repugnant to the more general description.[7] But it has been held that an attachment of all A.'s right, title, and interest, in and to any real estate in the county of P. is void for uncertainty.[8] And so, an attachment of a defendant's "life estate in all the lands got by his wife, supposed to be 450 acres."[9] And so an attachment of "one half of lot 60" without designating

[1] Crosby *v.* Allyn, 5 Maine, 453; Perrin *v.* Leverett, 13 Mass. 128; Taylor *v.* Mixter, 11 Pick. 341; Burkhardt *v.* McClellan, 15 Abbott Pract. R. 243, *note.*
[2] Wood *v.* Weir, 5 B. Monroe, 544.
[3] Taylor *v.* Mixter, 11 Pick. 341.
[4] Crosby *v.* Allyn, 5 Maine, 453.
[5] Howard *v.* Daniels, 2 New Hamp. 137; Taylor *v.* Mixter, 11 Pick. 341.
[6] Whitaker *v.* Sumner, 9 Pick. 308; Lambard *v.* Pike, 33 Maine, 141.
[7] Bacon *v.* Leonard, 4 Pick. 277.
[8] Hathaway *v.* Larrabee, 27 Maine, 449. *Sed contra*, Pratt *v.* Wheeler, 6 Gray, 520.
[9] Fitzhugh *v.* Hellen, 3 Harris & Johnson, 206.

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which half.[1] And so, an attachment of "lot No. 5 in block No. 12."[2]

In Missouri this case occurred. An attachment was levied upon the undivided interest of the defendant in "the south half of the southeast quarter of section 17, T. 57, R. 35, containing eighty acres." This property had, prior to the attachment, been subdivided by the owners into blocks and lots, with streets dedicated to public use separating the blocks, and some of the lots had been sold to third persons, and were occupied by them. Judgment and execution were obtained in the attachment suit, and the sheriff proceeded to sell a number of the lots laid out in the property described in the levy of the attachment. The purchasers claimed that they had acquired the defendant's undivided interest in these lots; but it was held, that the original levy was void for uncertainty; and that it should have described the property levied on with as much certainty as a sheriff's deed.[3]

§ 238. A point is here presented which, under some circumstances, might become of great importance in reference to the title to real estate: — Is it necessary to the validity of an attachment of real estate, and of the title derived through it, that the return should state the property to be the defendant's? In Alabama, on writ of error by the defendant to reverse a judgment because the return on the attachment did not so state, it was held, that a positive affirmation by the sheriff, that the property belonged to the defendant, would have no influence upon the question of title, and could not be more potent than a levy unaccompanied by such a declaration, and that the return was sufficient without it.[4] But supposing it sufficient to sustain the action, so far as the defendant is concerned, is it sufficient as a foundation of title, in favor of one claiming title through the attachment proceeding? In Maine, one claimed title through an attachment, which the officer returned that he had levied on property *supposed* to belong to the defendant; and it was held, that the qualifying term "supposed" did not impair the effect of the attachment, when the land was in fact the defendant's.[5] On the other hand, the Supreme Court of Iowa, after a full consideration of the subject, in an elaborate opinion,

[1] Porter *v.* Byrne, 10 Indiana, 146.
[2] Meuley *v.* Zeigler, 23 Texas, 88.
[3] Henry *v.* Mitchell, 32 Missouri, 512.
[4] Lucas *v.* Godwin, 6 Alabama, 831.
[5] Bannister *v.* Higginson, 15 Maine, 73.

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took the opposite view, and held that in order to pass a title, it should appear affirmatively that the property was attached as the property of the defendant.[1] This is in accordance with the doctrine which had been previously established in Virginia, Kentucky, and Missouri, in regard to attachments of personalty.[2]

§ 239. The effect of an attachment of real estate is, to give the plaintiff a lien upon the property from the date of the service of the writ. By the act of attaching, no estate passes to the plaintiff,[3] or to the attaching officer;[4] nor is the interest or the possession of the defendant devested, nor does the officer or the plaintiff acquire any right of possession, or right to take the issues or profits.

[1] Tiffany *v.* Glover, 3 G. Greene, 387. The following are the grounds of this decision. "The return of the officer, upon the writ, must constitute the foundation of all subsequent proceedings against the property under the attachment. It is only by the return that the court is advised of the levy, and special judgment and execution can only be awarded upon a sufficient levy, and this must be ascertained by the officer's return. The lien arising by virtue of the levy can only attach when the officer strictly complies with the requirements of the statute. The proceeding being in derogation of the common law, and of a violent character, it should affirmatively appear by the officer's return, that the provisions of the statute had been strictly observed, as the jurisdiction of the court over the property depends entirely on a legal levy. It is by virtue of the levy, authorized by statute, that the court proceeds to render judgment of condemnation against the property. If the levy is defective, the court, acting as a court of limited jurisdiction under a special and stringent statute, has no power to proceed against the land.

"In proceedings in attachment, the jurisdiction of the court is obtained by special authority, derived from the legislature, and hence the doctrine of presumption, as applicable to courts in the exercise of common law powers, cannot apply. In attachments, as we have said, it is the *levy* which confers jurisdiction, and if this appear defective, it cannot be obviated by legal intendment, or covered by the favor usually extended to courts in the exercise of their ordinary jurisdiction. This first step, necessary to confer power upon the court to charge the land, must be correctly taken, or all subsequent proceedings under the attachment will be *coram non judice* and void.

"The sheriff, under the statute, is only authorized to attach the property of the defendant. It should appear affirmatively, upon his return, that in this particular he observed the statute. The sheriff should have returned that the property attached was attached as the property of the defendant. In no other way could the court legally know the fact, and not until this fact was before the court could the court proceed against the land as the land of the defendant. If the property of the *defendant* was not attached, there was no lien, there was no levy; and as the fact that it was attached as the property of the defendant was essential to constitute a levy, such fact could not be established by extraneous evidence *dehors* the return. The attachment and sheriff's return became muniments of title. The source of title under attachment can only be ascertained by the return upon the attachment. To this the court must look in awarding special judgment and execution. If from this it cannot be ascertained whose property is attached, all further proceedings should cease."

[2] Clay *v.* Neilson, 5 Randolph, 596; Mason *v.* Anderson, 3 Monroe, 293; Anderson *v.* Scott, 2 Missouri, 15.

[3] Lyon *v.* Sanford, 5 Conn. 544.

[4] Scott *v.* Manchester Print Works, 44 New Hamp. 507.

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It merely constitutes a lien, which can be made available to the plaintiff only upon condition that he recover a judgment in the suit, and proceed according to the existing law to subject the property to sale under execution.[1] And this lien has been held to be as specific as if acquired by the voluntary act of the debtor, and to stand on as high equitable ground as a mortgage.[2] And where a debtor's equity of redemption of mortgaged land was attached, it was decided, that the attachment created a lien which entitled the plaintiff to redeem, and that a decree of foreclosure on a bill brought after the service of the attachment did not affect the rights of the attaching creditor, unless he were made a party to the suit.[3]

§ 240. It has just been stated, that the levy of an attachment upon real estate does not confer upon the attaching officer any right to take the issues and profits thereof. It may be added that, unlike the case of a levy on personalty, *he* acquires no lien upon, or special property in, the land. He is not required or authorized to take possession of it, nor in any event is he accountable for it, or for its rents, issues, or profits. His agency and authority are terminated whenever the duties are performed for which the process was put into his hands. The lien created by the attachment, whatever may be its character, is in the attaching creditor, and he only can release or discharge it. Where, therefore, the law required, in order to a valid attachment of real estate, that a copy of the writ, with the officer's return thereon, should be deposited in the office of the town clerk, and that was done; but the officer afterwards withdrew the copy from the town clerk's office, and erased his return therefrom, and substituted a return of an attachment of personalty; it was held, that such withdrawal and erasure did not affect the plaintiff's lien on the property.[4]

§ 241. The right to attach real estate extends as well to undivided interests as to interests in severalty. Therefore, where land descended to several children, who made partition of it among themselves by deed, and a creditor of one of the children, not

[1] Taylor *v.* Mixter, 11 Pick. 341; Scott *v.* Manchester Print Works, 44 New Hamp. 507.
[2] Carter *v.* Champion, 8 Conn. 549.
[3] Lyon *v.* Sanford, 5 Conn. 544.
[4] Braley *v.* French, 28 Vermont, 546.

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having either actual or constructive notice of the partition, attached all his debtor's undivided share in the estate; it was held, that the attachment created a lien which was not defeated by the partition.[1] And where an attachment was levied on the undivided interest of a debtor in a tract of land, and his co-tenant afterwards filed a petition for partition and obtained it, without any notice, actual or constructive, to the attaching creditor, who perfected his judgment, obtained execution, and levied it on the debtor's undivided interest, and then instituted suit for a partition; it was held, that the first partition, pending the attachment, did not affect the rights of the attaching creditor, and partition was decreed in his favor.[2] And in a case where an attachment was laid on a debtor's undivided interest in real estate, and, pending the attachment, a partition of the land was had, and the debtor's purparty set off to him in severalty, and the execution in the attachment suit was levied on the part so set off; it was decided that the lien of the attachment continued, notwithstanding the partition, and that the execution was properly levied on the several property.[3]

§ 242. The time when an attachment of real estate is actually effected might, in many instances, be of much importance. It would seem to be an undoubted principle, that such attachment would have no force until *completed* according to the existing statutory requirements. This view is sustained by a case in New Hampshire, which arose under the statute of that State, requiring a copy of the original writ and return to be left with the town clerk, in order to constitute an attachment. A. conveyed to B. certain real estate on the 10th of May, and the deed was recorded on the 13th of that month. On the 11th of the same month the

[1] M'Mechan *v.* Griffing, 9 Pick. 537.

[2] Munroe *v.* Luke, 19 Pick. 39. SHAW, C. J., in delivering the opinion of the court, said: "The main argument in the present case is, that the petitioners having only an attachment on the estate, at the time of the partition, they had no such interest or estate in the land as to entitle them to notice. The provision of the statute is, that the court shall not proceed to order partition, until it shall appear that the several persons interested have been duly notified of such petition by personal service or by publication, and have had opportunity to make their exception to the granting of the same. This language is broad enough to include the lien created by an existing attachment, which, though a contingent interest, is often a very important one, and extends to the whole value of the estate. And though only a lien when the action is pending, yet when judgment is rendered and execution levied, it relates back, to many purposes, to the time of the attachment, and especially so far as to defeat any *mesne* conveyances or incumbrances."

[3] Crosby *v.* Allyn, 5 Maine, 453; Argyle *v.* Dwinel, 29 Ibid. 29.

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premises were attached under a writ issued against A., and on that day the sheriff left with the town clerk a copy of the writ and his return thereon. Some time after the deed from A. to B. was recorded, the officer who served the attachment obtained access to the files of the town clerk, and, without the knowledge of either party, altered the copy of his return left there, and having made a similar alteration in his return upon the original writ, caused the writ to be returned. It was upon this amended return that the real estate was afterwards subjected to execution, and the purchaser under the execution was brought in conflict with the grantee in the deed. The court was of opinion that no valid attachment was made until the amended copy of the return was left with the town clerk, and as that took place some time after the deed was recorded, the grantee in the deed was entitled to hold the land.[1]

[1] Cogswell *v.* Mason, 9 New Hamp. 48.

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CHAPTER X

ATTACHMENT OF PERSONAL PROPERTY.

§ 243. UNDER this head will be considered, — I. What interests in, and descriptions of, personal property may be attached; and II. The requisites of a valid attachment of personalty.

§ 244. I. *What Interests in, and Descriptions of, Personal Property may be attached.* The first general proposition on this point is, that property which cannot be sold under execution cannot be attached.[1] Of course the correlative follows, that whatever may be sold under execution may be attached.[2] Money may be attached *in specie*,[3] and may be taken from the defendant's possession, if the officer can take it without violating the defendant's personal security.[4] Bank notes also may be attached,[5] and so, it is said, may treasury notes of the United States.[6] Stock in a corporation cannot be attached unless authorized by express statute.[7]

§ 244 *a*. Property which is exempt from execution, of course cannot be attached, unless the defendant consent, or be proceeded against as a non-resident.[8] This rule is not, however, to be extended beyond its terms, as expressed. If the party who might avail himself of the exemption sell the exempted property, a debt due him therefor may be attached.[9]

An officer levying an attachment upon property exempt from execution is liable to the defendant as a trespasser, if he know that it is exempt.[10] But in order to enforce this liability, the de-

[1] Pierce *v.* Jackson, 6 Mass. 242; Parks *v.* Cushman, 9 Vermont, 320; Halsey *v.* Whitney, 4 Mason, 206; Davis *v.* Garret, 3 Iredell, 459; Nashville Bank *v.* Ragsdale, Peck, 296.

[2] Handy *v.* Dobbin, 12 Johns. 220; Spencer *v.* Blaisdell, 4 New Hamp. 198; Goll *v.* Hinton, 7 Abbott Pract. R. 120.

[3] Turner *v.* Fendall, 1 Cranch, 117; Sheldon *v.* Root, 16 Pick. 567; Handy *v.* Dobbin, 12 Johns. 220.

[4] Prentiss *v.* Bliss, 4 Vermont, 513.

[5] Spencer *v.* Blaisdell, 4 New Hamp. 198.

[6] State *v.* Lawson, 7 Arkansas (2 English), 391.

[7] Haley *v.* Reid, 16 Georgia, 437; Nashville Bank *v.* Ragsdale, Peck, 296.

[8] Yelverton *v.* Burton, 26 Penn. State, 351.

[9] Scott *v.* Brigham, 27 Vermont, 561; Knabb *v.* Drake, 23 Penn. State, 489.

[10] Ante, § 195.

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fendant, if aware of the levy, must, at the time, claim the exemption, or it will be considered that he consents to it. Manifestly, he cannot set up such a claim after judgment rendered against him in the attachment suit.[1] If the property is a part of a larger quantity than the law exempts, the defendant must, at the time, set apart such portion as he is entitled to under the exemption, or he will be held to have waived his right.[2] And where, by law, the officer is required to make an inventory, and to have an appraisement made, no action will lie against him for seizing property which is less in value than the amount exempted, until he has had time to make the inventory and appraisement.[3]

§ 244 *b*. Property, the sale of which is penal, cannot be attached. Where, therefore, the sale of spirituous liquor was forbidden by law, it was held, that it could not be attached, because its subsequent sale under execution would be illegal.[4]

§ 244 *c*. One of the indications of the tendency to extend the operation of the remedy by attachment is the recent adoption in several States of provisions authorizing the seizure of evidences of debt, and their sale under execution. In New York, for instance, the words "personal property," as used in the Code of Procedure, are declared to include "money, goods, chattels, things in action, and evidences of debt." Under this Code, an attachment was obtained against a railroad company, and was attempted to be levied on certain bonds made by the company, which had never been negotiated, but were deposited with a creditor of the company, as collateral security for moneys advanced. It was held, that they were not things in action or evidences of debt, subject to levy, as no purchaser of them could acquire any right to enforce them against the company.[5]

In Wisconsin, under a statute of similar character, authorizing the attachment of "notes, accounts, and other evidences of debt," and their collection by the sheriff, it was held, that those evidences of debt which may be attached by seizure, are only those which

[1] State *v.* Manly, 15 Indiana, 8.
[2] Nash *v.* Farrington, 4 Allen, 157; Clapp *v.* Thomas, 5 Ibid. 158.
[3] Bonnel *v.* Dunn, 5 Dutcher, 435.
[4] Nichols *v.* Valentine, 36 Maine, 322.
[5] Coddington *v.* Gilbert, 5 Duer, 72; s. c. 2 Abbott Pract. R. 242; 17 New York, 489.

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are complete and perfect evidences in themselves; and it was determined that account books were no such evidence; that their seizure did not vest the sheriff with any right to collect any account contained in them; and that the only way to reach an indebtedness of such character was by garnishment of the debtor; and that a garnishment after the sheriff's seizure would hold the debt.[1]

§ 245. A fundamental principle is, that an attaching creditor can acquire no greater right in attached property, than the defendant had at the time of the attachment. If, therefore, the property be in such a situation that the defendant has lost his power over it, or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debt.[2] Thus, a chattel pawned or mortgaged is not attachable, in an action against the pawner or mortgagor;[3] and the pawnee may maintain trespass against an officer attaching it, and recover the whole value in damages, though it was pledged for less; for he is answerable for the excess to the person who has the general property.[4] So, goods upon which freight is due cannot be attached, without paying the freight;[5] and if an officer pay the freight, in order to get the goods into his possession, he stands, in respect to the lien for the freight, in the place, and has the rights, of the carrier.[6] So, goods manufactured by one for another cannot be attached in an action against the general owner; for the manufacturer has a lien on them for his work and labor.[7] Property in the hands of a bailee for hire cannot be attached in a suit against the bailor, during the term of the bailment;[8] nor can personalty leased for a term of years be seized under an attachment against the lessor, even though the sale of it by the sheriff be with

[1] Brower v. Smith, 17 Wisconsin, 410.

[2] Babcock v. Malbie, 7 Martin, N. S. 139; Hepp v. Glover, 15 Louisiana, 461; Powell v. Aiken, 18 Ibid. 321; Deloach v. Jones, Ibid. 447; Urie v. Stevens, 2 Robinson (La.), 251; Oliver v. Lake, 3 Louisiana Annual, 78.

[3] Badlam v. Tucker, 1 Pick. 389; Holbrook v. Baker, 5 Maine, 309; Thompson v. Stevens, 10 Ibid. 27; Sargent v. Carr, 12 Ibid. 396; Picquet v. Swan, 4 Mason, 443; Lyle v. Barker, 5 Binney, 457; Haven v. Low, 2 New Hamp. 13; Anderson v. Doak, 10 Iredell, 295; Williams v. Whoples, 1 Head, 401.

[4] Lyle v. Barker, 5 Binney, 457.

[5] DeWolf v. Dearborn, 4 Pick. 466.

[6] Thompson v. Rose, 16 Conn. 71.

[7] Townsend v. Newell, 14 Pick. 332.

[8] Hartford v. Jackson, 11 New Hamp. 145

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a reservation of the lessee's right to retain possession during the continuance of the term.[1]

Where property has been consigned to a factor, entitled to a privilege thereon, so that the consignor or owner cannot take it out of his hands without paying his claim, a creditor of the owner cannot attach it. In such a case, where the consignee has made acceptances on account of the property, a creditor of the consignor, wishing to take the property out of the hands of the consignee without paying the amount of his acceptances, must show that the acceptances were not made in good faith, and that the consignee is not bound to pay them.[2] And in such case the factor may bring replevin for the property; and his right to maintain the action will not be defeated by his consenting to become keeper of the goods for the attaching officer.[3] So, it was held in South Carolina, that a foreign ship and cargo consigned to one in that State could not be attached in a suit against the owner; the court holding that the consignee has, in contemplation of law, a qualified property in the ship and cargo, and a constructive possession, the moment she comes into port; and that from that moment the consignee has the direction and management of her, for the benefit of all concerned; and that she is under his power and government, and subject to his orders, and he may therefore be considered in law as in possession of the whole property. The court intimated that the proper way to attach the property was by garnishment of the consignee.[4]

A case of not unfrequent occurrence is that of goods being attached, where the vendor of them to the defendant is entitled to exercise the right of stoppage *in transitu*, and exercises that right while the attachment is pending. In such case the principle announced at the opening of this section undoubtedly applies, and the vendor is not precluded by the attachment from exercising his right of stoppage, even though the goods may, by order of the court, have been sold; he is entitled to the proceeds in the hands of the court.[5]

[1] Smith *v.* Niles, 20 Vermont, 315. But the interest of a lessee of personalty may be seized and sold. Wheeler *v.* Train, 3 Pick. 255.

[2] Lambeth *v.* Turnbull, 5 Robinson (La.), 264; Skillman *v.* Bethany, 2 Martin, N. S. 104; Brownell *v.* Carnley, 3 Duer, 9; M'Neill *v.* Glass, 1 Martin, N. S. 261.

[3] Sewall *v.* Nicholls, 34 Maine, 582; Brownell *v.* Carnley, 3 Duer, 9.

[4] Schepler *v.* Garriscan, 2 Bay, 224; Mitchell *v.* Byrne, 6 Richardson, 171

[5] O'Brien *v.* Norris, 16 Maryland, 122.

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§ 245 *a*. The point of time at which one so far loses his power over personalty which he has agreed to sell to another, as that it is not subject to attachment for his debt, is a matter of importance, and sometimes of difficulty. The general principle may be stated to be, that that act which changes the control and dominion of property, after an agreement for a sale,—that which supersedes the power and control of the vendor, and transfers it to the vendee, is a good delivery to pass the property to the latter, and to defeat its attachment for a debt of the former. Thus, where A., in fulfilment of an agreement for a sale to B., shipped goods at Albany, by railroad, to be forwarded to Boston, taking a receipt or way-bill, making them deliverable to himself, and enclosed to B. a written order making them deliverable to B., who, on receipt thereof, notified the agent of the railroad, and at the same time paid the freight; it was held, that there was a sufficient delivery to pass the property from A. to B., though the latter had not reduced it to actual possession, and that it could not be attached for the debt of A., either while *in transitu* or after its arrival at Boston.[1]

§ 246. The foregoing are instances in which the owner has so far lost his power over the property as that it cannot be attached for his debt. The same result follows in relation to property, in or over which a person has not yet acquired such interest or power as is considered in law to constitute an attachable interest. Thus, where merchants residing in the city of New York received an order for goods from persons residing at a distance, without particular directions as to the manner in which the goods should be forwarded; and the vendors proceeded to select the goods ordered, and a portion of them, after being packed in boxes, were placed on board a vessel for transportation, the cartman taking from the master of the vessel receipts for each load; it was held, that no person but the shipper was entitled to a bill of lading; and the shipper, being also the holder of the receipts, might direct to whom the bill of lading should be made out, and until he should do so the right of possession remained in himself; and, therefore, that there was no such delivery to the purchasers as rendered the goods liable to seizure under an attachment against them.[2] So, of goods sold to one for resale, to be accounted for, at a future

[1] Hatch *v.* Bayley, 12 Cushing, 27; Hatch *v.* Lincoln, Ibid. 31.
[2] Jones *v.* Bradner, 10 Barbour, 193; Scholfield *v.* Bell, 14 Mass. 40.

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day, to the vendor, and if sold, to be paid for; if not, to be returned. While this arrangement is pending, the vendee has no attachable interest in them.[1] So, where, by a parol contract between the parties, A. was to cultivate B.'s farm, find part of the seed, harvest the crop, and then take one half of it as a compensation for his labor, and deposit the other half in such place as B. should direct; and before the crop was harvested A. absconded, being insolvent; it was held, that he had no such interest in the crop as would render it liable to attachment for his debts.[2] So, where A. leased a farm to B., who was to have one half of the increase and produce, but the stock and produce were to be at A.'s control until sold; it was held, that B. had not such an interest in the produce as could be attached.[3] So, where by the terms of the lease of a farm it was stipulated that "all the hay and straw shall be used on said farm," it was decided that the lessee had no attachable interest in such hay and straw.[4] So, where, by an agreement between a father and his son, the father was to carry on business in the name and on account of the son, and as his agent, and the son was to give the father one half of the profits, as a compensation for his services; and some property purchased by the father in the name of the son was attached in a suit against the father; it was held, that the father had no attachable interest in the property.[5] So, where property is sold and delivered, upon condition that the title shall not vest in the vendee, unless the price agreed upon be paid within a specified time, the vendee has no attachable interest in the property until performance of the condition.[6] So, if one acquires by purchase the possession of personal property by fraudulent means, he has not such title thereto as will enable his creditors to attach and hold it as against the person from whom it was fraudulently obtained.[7] So, property consigned

[1] Meldrum *v.* Snow, 9 Pick. 441.

[2] Chandler *v.* Thurston, 10 Pick. 205.

[3] Esdon *v.* Colburn, 28 Vermont, 631; Lewis *v.* Lyman, 22 Pick. 437. But where a lease provided, that all the produce deposited on land so leased should be at the lessor's disposal, and that he might enter to take it for the payment of any rent that might be in arrear, it was decided that, as against creditors of the lessee, such a provision was neither an absolute sale nor a mortgage, and that the produce could be attached for the lessee's debt. Butterfield *v.* Baker, 5 Pick. 522.

[4] Coe *v.* Wilson, 46 Maine, 314.

[5] Blanchard *v.* Coolidge, 22 Pick. 151.

[6] Buckmaster *v.* Smith, 22 Vermont, 203; Woodbury *v.* Long, 8 Pick. 543; McFarland *v.* Farmer, 42 New Hamp. 386.

[7] Buffington *v.* Gerrish, 15 Mass. 156; D'Wolf *v.* Babbett, 4 Mason, 289; Gasquet

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to a factor cannot be attached for his debt, though he have a lien on it; for his lien does not dispossess the owner, until the right is exercised by the factor, whose privilege is a personal one, and cannot be set up against the owner by any one but the factor himself.[1] So, property lent to one cannot be attached for his debt.[2] So, a vested remainder in personal property cannot be attached during the continuance of the life estate, and while the property is in the possession of the tenant for life.[3]

Similar to the foregoing instances is the case of the money of a pensioner of the United States, paid by the disbursing officer of the government to the pensioner's attorney, and attempted to be subjected to attachment in his hands. Such a case arose in Vermont, and the court there held, that the money was protected by the act of Congress, as long as it retained the distinctive character of a pension; which it retained, at least until paid to the pensioner, and was not therefore liable to attachment in the hands of his agent, before it was paid to him.[4] So, coin paid to an attorney at law, in satisfaction of a debt held by him for collection, cannot be levied on as the property of the party for whom it was collected; for, until it is paid over to that party, he acquires no specific interest in *the particular pieces of coin*, but only a right to receive from the attorney the amount of money collected.[5]

§ 247. An interesting question connected with this topic is, whether a husband has an attachable interest in his wife's *choses in action*, before he has reduced them to possession. Upon this subject courts of high authority have taken entirely opposite grounds, and the question cannot be considered as yet settled either way, by weight of authority. In the affirmative it is held, that the wife's *choses in action* are, in virtue of the marriage, vested absolutely in the husband; that he has in law the sole right, during the coverture, to reduce them to possession, to sue for them, to sell them, to release them; and that he has, therefore,

v. Johnson, 2 Louisiana, 514; Thompson *v.* Rose, 16 Conn. 71; Hussey *v.* Thornton, 4 Mass. 405; Bradley *v.* Obear, 10 New Hamp. 477; Parmele *v.* M'Laughlin, 9 Louisiana, 436; Galbraith *v.* Davis, 4 Louisiana Annual, 95; Wiggin *v.* Day, 9 Gray, 97.

[1] Holly *v.* Huggeford, 8 Pick. 73. On the point of the lien of the factor being a personal one, see, also, Kittredge *v.* Sumner, 11 Pick. 50.

[2] Morgan *v.* Ide, 8 Cushing, 420; Chase *v.* Elkins, 2 Vermont, 290.

[3] Goode *v.* Longmire, 35 Alabama, 668; Carson *v.* Carson, 6 Allen, 397.

[4] Adams *v.* Newell, 8 Vermont, 190; Bank of Tennessee *v.* Dibrell, 3 Sneed, 379.

[5] Maxwell *v.* McGee, 12 Cushing, 137.

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an interest in them which he may assign to another, and therefore an interest which may be reached by attachment, and subjected to the payment of his debts. Such are the views expressed in Massachusetts, Maryland, Delaware, Virginia, and Missouri.[1] It is, however, admitted, that if the husband die pending an attachment of his interest, and before the same is finally subjected to his debt, the attachment will fail, because of the wife's right of survivorship.[2] On the other hand, it is considered, — in the language of the Supreme Court of Pennsylvania, — "that though marriage is in effect a gift of the wife's personal estate in possession, it is but a conditional gift of her chattels in action; such as debts, contingent interests, or money owing her on account of intestacy. Perhaps the husband has in strictness but a right to make them his own by virtue of the wife's power over them, lodged by the marriage in his person. But if these be not taken into his possession, or otherwise disposed of by him, they remain to the wife; and if he destines them so to remain, who shall object? Not his creditors; for they have no right to call on him to obtain the ownership of the wife's property for their benefit; and, until he does obtain it, there is nothing in him but a naked power, which is not the subject of attachment."[3] These are substantially the views also of the courts of New Hampshire, Vermont, North Carolina, and South Carolina.[4] When such a difference of opinion exists between courts of such acknowledged ability as those which have passed on this question, the subject must needs be remitted to the future, for a nearer approximation to agreement.

§ 248. The defendant's interest in personal property need not, in order to its being subject to attachment, be several and exclusive. An interest held by him in common with others may be

[1] Shuttlesworth *v.* Noyes, 8 Mass. 229; Commonwealth *v.* Manley, 12 Pick. 173; Holbrook *v.* Waters, 19 Ibid. 354; Wheeler *v.* Bowen, 20 Ibid. 563; Strong *v.* Smith, 1 Metcalf, 476; State *v.* Krebs, 6 Harris & Johnson, 31; Peacock *v.* Pembroke, 4 Maryland, 280; Johnson *v.* Fleetwood, 1 Harrington, 442; Babb *v.* Elliott, 4 Ibid. 466; Vance *v.* McLaughlin, 8 Grattan, 289; Hockaday *v.* Sallee, 26 Missouri, 219.

[2] Strong *v.* Smith, 1 Metcalf, 476; Vance *v.* McLaughlin, 8 Grattan, 289; Hockaday *v.* Sallee, 26 Missouri, 219.

[3] Dennison *v.* Nigh, 2 Watts, 90; Robinson *v.* Woelpper, 1 Wharton, 179.

[4] Marston *v.* Carter, 12 New Hamp. 159; Wheeler *v.* Moore, 13 Ibid. 478; Pickering *v.* Wendell, 20 Ibid. 222; Parks *v.* Cushman, 9 Vermont, 320; Short *v.* Moore, 10 Ibid. 446; Probate Court *v.* Niles, 32 Ibid. 775; Arrington *v.* Screws, 9 Iredell, 42; Pressley *v.* McDonald, 1 Richardson, 27; Godbold *v.* Bass, 12 Ibid. 202.

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attached;[1] and the property may be seized and removed, though the rights of the other joint owners may thereby be impaired.[2] In such case, only the undivided interest of the defendant can be sold, and the purchaser becomes a tenant in common with the other cotenant.[3] If the officer sell the whole, it is, as to the cotenant, a conversion, for which he will be liable to the cotenant in trover.[4] In cases of attachment of property jointly owned, if the attachment be dissolved, the officer's liability to the defendant for the property will be discharged by its delivery to the cotenant.[5] The doctrine stated in this section applies to cases other than partnerships; concerning which latter there is much diversity of decision.

§ 249. Where property is of such nature that an attachment of it would produce a sacrifice and great injury to the defendant, without benefiting the plaintiff, it is not attachable. Such is the rule in relation to the defendant's private papers,[6] or his books, in which his accounts are kept.[7] Much less would an attachment be considered to create a lien on the accounts contained in the books.[8] This rule applies also, in relation to property which is in

[1] Buddington *v.* Stewart, 14 Conn. 404; Marion *v.* Faxon, 20 Ibid. 486; Walker *v* Fitts, 24 Pick. 191; Goll *v.* Hinton, 7 Abbott Pract. R. 120, overruling Stoutenburgh *v.* Vandenburgh, 7 Howard Pract. R. 229, and Sears *v.* Gearn, Ibid. 383.

[2] Remmington *v.* Cady, 10 Conn. 44; Reed *v.* Howard, 2 Metcalf, 36.

[3] Mersereau *v.* Norton, 15 Johns. 179; Ladd *v.* Hill, 4 Vermont, 164.

[4] Ladd *v.* Hill, 4 Vermont, 164; Bradley *v.* Arnold, 16 Ibid. 382; White *v.* Morton, 22 Ibid. 15; Melville *v.* Brown, 15 Mass. 79; Eldridge *v.* Lancy, 17 Pick. 352; Walker *v.* Fitts, 24 Ibid. 191.

[5] Frost *v.* Kellogg, 23 Vermont, 308.

[6] Oystead *v.* Shed, 12 Mass. 506.

[7] Bradford *v.* Gillaspie, 8 Dana, 67; Oystead *v.* Shed, 12 Mass. 506.

[8] Ohors *v.* Hill, 3 M'Cord, 338. It is very doubtful whether the exemption of books of accounts and negotiable securities from direct attachment is not fraught with evil, as it affords an abundant opportunity for fraudulent concealment of means which debtors have for paying their debts. The State of Ohio in its Code of Civil Procedure, adopted in 1853, and the State of Missouri, in 1855, have taken a very important step, which deserves to be followed generally, in authorizing the attachment of *all* books of account, accounts, and securities of the debtor, and placing them in the hands of a receiver appointed by the court, who collects them, and applies the proceeds under the direction of the court. Under a statute requiring the sheriff to attach and "take into his custody all books of account, vouchers, and papers, relating to the property, debts, credits, and effects of the debtor, together with all evidences of his title to real estate; which he shall safely keep, to be disposed of as directed"; it was held, that letters and correspondence were not attachable; and that an officer who assumed to examine attached books and papers, and take copies of business letters, and look into the correspondence of the defendant, or do any other act in relation to them, than simply to keep them safely, subject to the direction of the judge who allowed the process, was

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its nature so peculiarly perishable, that, manifestly, the purpose of the attachment cannot be effected before it will decay and become worthless; as, for instance, fresh fish, green fruits, and the like.[1] And it has been held, that a growing crop of grass cannot be attached.[2] Author 57 Cal 254

§ 250. Where property is so in the process of manufacture and transition as to be rendered useless, or nearly so, by having that process arrested, and to require art, skill, and care to finish it, and when completed it will be a different thing, it is not subject to attachment. Such are hides in vats, in the process of tanning, which, if taken out prematurely and dried, could never be converted into leather, or restored to their former condition.[3] Such, too, are a baker's dough; materials in the process of fusion in a glass factory; burning ware in a potter's oven; a burning brick-kiln; or a burning pit of charcoal. In all such cases, the officer cannot be required to attach; for he should have the right of removal; and he is not bound to turn artist, or conduct, in person or by an agent, the process of manufacture, and be responsible to both parties for its successful termination.[4] But where a pit of charcoal was in part entirely completed, so as not to require any further attention or labor, and the residue had so far progressed in the process, as that it was in fact completed, but some labor and skill were still necessary, in order to separate and preserve it properly; it was held, that if an officer saw fit to attach and take possession of it, and run the risk of being able to keep it properly,

guilty of an unpardonable abuse of his powers, and of the process of the court; and the court ordered the books and papers attached to be kept under lock and key, without power on the part of any one, except the defendant, to examine them; and required the officer to deliver up to the defendant's counsel all copies taken by him, and to make oath at the time of the delivery, that such copies embraced all that the officer believed to exist; and ordered that the plaintiff's counsel should be restrained from using, in any way, the books and papers attached, or disclosing their contents, or the contents of copies taken from them. Hergman *v.* Dettlebach, 11 Howard Pract. R. 46.

[1] Wallace *v.* Barker, 8 Vermont, 440. In Penhallow *v.* Dwight, 7 Mass. 34, it was held, that an entry on land for the purpose of levying an execution on unripe corn or other produce, which would yield nothing, but in fact be wasted and destroyed by the very act of severing it from the soil, would be illegal. But such is not the case where the produce, such as corn and potatoes, is ripe for the harvest. Heard *v.* Fairbanks, 5 Metcalf, 111.

[2] Norris *v.* Watson, 2 Foster, 364. It was, in Massachusetts, sought to establish the rule that hay in a barn could not be attached, because of the difficulty of removing it without loss, and of identifying it; but the court refused to sustain that position. Campbell *v.* Johnson, 11 Mass. 184.

[3] Bond *v.* Ward, 7 Mass. 123.

[4] Wilds *v.* Blanchard, 7 Vermont, 138.

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he had a right to do so; and that, if any portion of the coal should, through the want of proper care and attention on his part, be destroyed, the owner could not maintain trespass against him for such non-feasance, and that the attaching creditor was not liable therefor, unless the omissions were by his command or assent.[1]

§ 251. Property *in custodia legis* cannot be attached. Thus, goods attached by one officer, and in his possession, cannot be attached by another officer.[2] So, goods held by a collector of the revenue of the United States, to enforce payment of, or as security for, the duties thereon, are not attachable by a creditor of the importer.[3] So, where a ship was in the possession of a sheriff, under an attachment issued out of a State court, it was held, that she could not be attached by a marshal of the United States, under a warrant in admiralty.[4] Nor can property attached by an officer of a United States court be taken out of his hands by an officer under process issued by a State court.[5] Repeated attempts have been made to levy attachments or executions upon money collected under execution; but such money, while in the hands of the officer who collected it, has uniformly been held to be *in custodia legis*, and for that and other reasons, not subject to such levy.[6] This rule, however, applies only where the sheriff is bound, *virtute officii*, to have the money in hand to pay to the execution plaintiff; and not to cases in which he has in his possession, after satisfying the execution, a surplus of money, raised by the sale of property. Such surplus is the property of the execution defendant, and being held by the sheriff in a private, and not in his official capacity, it may be attached in his hands.[7]

[1] Hale *v.* Huntley, 21 Vermont, 147. [2] Post, § 267.

[3] Harris *v.* Dennie, 3 Peters, 292.

[4] The Ship Robert Fulton, 1 Paine, 620; The Oliver Jordan, 2 Curtis, 414; Taylor *v.* Carryl, 24 Penn. State, 259, and 20 Howard Sup. Ct. 583.

[5] Freeman *v.* Howe, 24 Howard Sup. Ct. 450; Moore *v.* Withenburg, 13 Louisiana Annual, 22; Lewis *v.* Buck, 7 Minnesota, 104.

[6] Turner *v.* Fendall, 1 Cranch, 117; Prentiss *v.* Bliss, 4 Vermont, 513; First *v.* Miller, 4 Bibb, 311; Dubois *v.* Dubois, 6 Cowen, 494; Crane *v.* Freese, 1 Harrison, 305; Dawson *v.* Holcomb, 1 Ohio, 135; Reddick *v.* Smith, 4 Illinois (3 Scammon), 451; Thompson *v.* Brown, 17 Pick. 462; Conant *v.* Bicknell, 1 D. Chipman, 50; Farmers' Bank *v.* Beaston, 7 Gill & Johnson, 421; Jones *v.* Jones, 1 Bland, 443; Blair *v.* Cantey, 2 Speers, 34; Burrell *v.* Letson, 1 Strobhart, 239; Clymer *v.* Willis, 3 California, 363. These authorities bear on the question of seizing the money *in specie*. For those applicable to an attempt to reach it by garnishment, see Chapter XXII.

[7] Orr *v.* McBride, 2 Carolina Law Repository, 257; Watson *v.* Todd, 5 Mass. 271; Davidson *v.* Clayland, 1 Harris & Johnson, 546; Tucker *v.* Atkinson, 1 Humphreys, 300.

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Upon the principle that property *in custodia legis* is exempt from attachment, it has been held, that money paid into the hands of a clerk or prothonotary of a court on a judgment,[1] or which is in his possession in virtue of his office,[2] cannot be attached. So, of money paid into court.[3] So, of property in the hands of an administrator, which will belong to the defendant as distributee, after settlement of the administrator's accounts.[4] So, property in the hands of an executor cannot be attached in a suit against a residuary legatee or a devisee.[5] So, property of a person who has been judicially found to be insane cannot be attached in the hands of his guardian.[6] So, it has been held, that garnishment has the effect to place the property in the garnishee's hands in the custody of the law, and that an officer has no right, after the garnishment, to take the property from the garnishee.[7] But in Massachusetts it was decided that, though garnishment is an attachment of the effects in the garnishee's hands, yet they may be attached and taken into the possession of the officer, subject to the lien of the creditor who effected the garnishment.[8]

A case of interest and importance is reported in Louisiana, in which the doctrine now under consideration was applied. A suit in chancery was instituted in Memphis, Tennessee, by stockholders of a bank there, against the bank and its president and directors; in which a receiver was appointed, an injunction obtained, and an order for the delivery of the assets of the bank to the receiver, served on the president; who, during an unsuccessful attempt to enforce the process of the court, obtained possession of, and ran off with, the assets to New Orleans, where they were attached in his hands by a creditor of the bank, and were claimed in the attachment suit by the receiver appointed by the court in Tennessee. The New Orleans court promptly ordered them to be released from the attachment, and delivered to the receiver.[9]

[1] Ross *v.* Clarke, 1 Dallas, 354; Allston *v.* Clay, 2 Haywood (N. C.), 171.
[2] Hunt *v.* Stevens, 3 Iredell, 365.
[3] Farmers' Bank *v.* Beaston, 7 Gill & Johnson, 421.
[4] Elliott *v.* Newby, 2 Hawks, 21; Young *v.* Young, 2 Hill (S. C.), 425.
[5] Thornhill *v.* Christmas, 11 Robinson (La.), 201.
[6] Hale *v.* Duncan, Brayton, 132.
[7] Scholefield *v.* Bradlee, 8 Martin, 495; Brashear *v.* West, 7 Peters, 608; Dennistoun *v.* New York C. & S. F. Co., 6 Louisiana Annual, 782.
[8] Burlingame *v.* Bell, 16 Mass. 318; Swett *v.* Brown, 5 Pick. 178.
[9] Paradise *v.* Farmers and Merchants' Bank, 5 Louisiana Annual, 710. From the opinion of the court the following extract is presented. "The property which thus

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In Alabama this case occurred. An attachment was placed in the hands of a sheriff, and, before its levy, a writ of seizure was issued by a court of chancery, and directed to the same officer. With both writs in his hands he attempted to execute both at the same time; but it was held, that the attachment was inoperative, and must give way; that he could not qualify and restrict the custody which he took for the court, under the writ of seizure, with the levy of the attachment, unless he had the property under his control; and the moment he acquired that control, the property was in the custody of the court.[1]

§ 252. It has been attempted to apply in this country the rule of the English law of distress, exempting from seizure whatever is in a party's present use or occupation; but the attempt has met with only partial success. In Tennessee, a levy on a blacksmith's

stands before us for adjudication appears to have been brought within the jurisdiction of this court in disobedience and in violation of the process of a court of a sister State, and in fraudulent violation of the rights of property of its real owners. It is proved, that the process of the court of chancery, and a writ of injunction, and an order directing the delivery of the assets of the bank forthwith to the receiver, were duly served on Fowlkes [the president] as well as the directors of the bank.

"The grounds on which it is contended the judgment of the district court [ordering the property to be delivered to the receiver] is to be reversed, are: 1. That a receiver in chancery cannot maintain a suit without special authority from the court which appoints him. 2. That the possession of the property attached, not having been in the receiver, it is liable to the process of attachment at the instance of a *bonâ fide* creditor.

"We will not inquire into the technical question whether the authority of the chancellor is necessary to institute a suit at law; it is sufficient for us that property, in relation to which an order of a court of a sister State of competent jurisdiction has been issued, has been fraudulently or forcibly withdrawn from its jurisdiction by a party to the suit, and that the injunction issued in this case by the chancellor is still in force and binding upon the offending party. The order of the court of chancery is a sufficient authority for the intervenor [the receiver] to receive the assets of the bank; and the delivery to him will be a good delivery, binding upon the bank, as well as in the furtherance of justice. We have uniformly discountenanced all attempts, in whatever form they may be made, of making our courts instruments for defeating the action of courts of other States on property within their jurisdiction, by means of clandestine or forcible removal to this State. The only decree we render in such cases is that of immediate and prompt restitution, or one preventing any rights to be acquired by these attempts to defeat the ends of justice.

"This is an answer to the question raised concerning the peculiar right of the creditor. The only right which he in any event could reach, would be subordinate to the injunction from the operation of which this property has been attempted to be removed. Not only on general principles, but on the cases cited by the learned judge who decided this case, the claim of the plaintiff to subject this property to attachment is without the shadow of right. See Wingate *v.* Wheat, 6 Louisiana Annual, 238; Myers *v.* Myers, 8 Ibid. 369.

[1] Read *v.* Sprague, 34 Alabama, 101.

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tools, while he was using them, was sustained.[1] And so, in Massachusetts, was an attachment of a stage-coach, actually in use.[2]

Those are instances of personal property not worn about the defendant's person. In regard to property so worn, the English doctrine in relation to distress was fully adopted by the Supreme Court of Massachusetts in a case where an officer into whose hand the defendant placed a watch, to compare its weight with that of another, took it, under an attachment, from the person of the defendant, by severing a silk band which passed about his neck, and to which the watch was attached. The court held, that the seizure was wrongful, and that the watch could not be held under the attachment.[3]

[1] Bell *v.* Douglass, 1 Yerger, 397.

[2] Potter *v.* Hall, 3 Pick. 368. PARKER, C. J., said: "It is said that property in actual use was not subject by the common law to distress for rent, and that the same law is to determine what property is or is not attachable under our statutes. The principles of the common law will undoubtedly apply, because founded on reason; but the application of these principles may be different now, from that which was made several hundred years ago, when the rule was laid down. The state of the country then required larger exemptions than at present. Everything was then subservient to agriculture. Now commerce and credit assume an equal rank, and things which were necessary for a man's living at a former period have ceased to be so. . . . . The cases put in Comyns's Digest to illustrate the general position, that chattels in actual use are not to be taken in distress, show that the rule was applied to things comparatively of small value, and such as could not be taken without great inconvenience, and in some of the cases they were other persons' property accidentally upon the land; a horse actually in riding, or going to mill, or standing at the miller's door, &c. To apply a rule which had protected such kind of property to articles of luxury, or of great value, would be contrary to the reason of the common law. Stage-coaches are often of great value, and many of them owned by the same person. Ships, steamboats, &c., come within the same reason; creditors, and credit itself, would be exceedingly injured, if they were held free from attachment."

[3] Mack *v.* Parks, 8 Gray, 517. The following are the views expressed by the court: "The justification on which the defendant relies in answer to the trespass alleged in the declaration depends on the right of the sheriff or other officer to attach on *mesne* process articles worn on the person of the debtor as part of his dress or apparel, at the time when the attachment is made, or then in his actual possession and use.

"We are not aware that any such right has ever before been asserted in this Commonwealth. There is no judicial recognition of it, and we are quite sure that there has never been any attempt practically to enforce it. It can hardly be supposed that the omission to exercise it has been caused by forbearance or ignorance. Creditors are not apt to slumber over their rights, or lose them for want of vigilance, or out of tenderness towards their delinquent debtors. This consideration is entitled to great weight, because we are to seek for the origin and foundation of the right on which the defendant rests his justification, among those well understood and recognized usages and customs which have become a part of our unwritten law.

"By the Rev. Sts. c. 90, § 24, it is provided that all goods and chattels that are liable to be taken on execution may be attached, 'except such as, from their nature or situation, have been considered as exempted from attachment, according to the principles of the common law as adopted and practised in this State.' . . . . With a few exceptions, the kind of goods lawfully subject to distress or attachment has never been do-

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§ 252 *a*. The property of individuals or corporations who owe duties to the public, is not for that reason exempted from liability

fined by statute, either under the Colonial or State government. It must therefore be determined by the common law.

"It seems to be perfectly well settled at common law, that chattels in the actual possession and use of a debtor cannot be taken or distrained. It is laid down in Co. Lit. 47 *a*, that 'although it be of valuable property, as a horse, &c., yet when a man or woman is riding on him, or an axe in a man's hand cutting of wood and the like, they are for that time privileged, and cannot be distrained.' So 'if nets are in the hands of a man they cannot be distrained any more than a horse on which a man is.' Hargrave's note (294). S. P. Read *v.* Burley, Cro. Eliz. 539, 596. In the leading case of Simpson *v.* Hartopp, Willes, 512, which Mr. Justice BULLER says (4 T. R. 568) is 'of great authority, because it was twice argued at the bar, and Lord Chief Justice WILLES took infinite pains to trace with accuracy those things which are privileged from distress,' it is distinctly adjudged that things in actual use cannot be taken or distrained; and the reason given is, that an attempt to distrain such articles would lead to a breach of the peace. In the modern case of Sunbolf *v.* Alford, 3 M. & W. 253, it is laid down as well-settled law, that 'goods in the actual possession and use of the debtor cannot be distrained'; 'a man's clothes cannot be taken off his back in execution of a *fieri facias*.' The main ground on which these and other authorities rest is, that it would tend directly to a collision and breach of the peace, if articles thus situated were allowed to be taken from the hands of a debtor. Gorton *v.* Falkner, 4 T. R. 565; Storey *v.* Robinson, 6 T. R. 139; Adames *v.* Field, 12 Ad. & El. 649, and 4 Perry & Dav. 504; Com. Dig. Distress C.; Gilbert on Distresses, 43. There are many articles of personal property, subject to attachment under our laws and usages, which could not have been distrained or taken at common law under the rule as stated in the earliest authorities. Potter *v.* Hall, 3 Pick. 368. But in the absence of any proof of usage or custom in this State, from which it might be inferred that a different rule of law has ever been adopted, the present case falls within the principles on which the English authorities rest, and must be governed by them.

"The watch, at the time it was taken by the defendant, was in the plaintiff's actual possession and use, worn as part of his dress or apparel, and was severed from his person by force. Such an act, if permitted, would tend quite as directly to a breach of the peace as to take from a man the horse on which he was riding, or the axe with which he was felling a tree. It is indeed a more gross violation of the sanctity of the person, and tends to a greater aggravation of the feelings of the debtor. Nor would it be practicable to place any limit to the exercise of such a right. If allowed at all, it must extend to every article of value usually worn or carried about the person; if an officer can sever a silken cord, he may likewise break a metallic chain; if he can seize and take a watch, so he may wrest a breastpin or ear-ring from the person, or thrust his hand into the pocket and carry off money; he may, in short, resort to any act of force necessary to enable him to attach property in the personal custody of the debtor. It is obvious that such a doctrine would lead to consequences most dangerous to the good order and peace of society

"It is no answer to this action, that the defendant tendered to the plaintiff the value of the cord by which the watch was attached to the person, or that the watch itself, detached from the person, was subject to attachment. The wrong consists in having taken an article from the person of the plaintiff, which was at the time by law exempted from attachment. The mode in which it was done is wholly immaterial. He is liable for the value of the watch, being a trespasser *ab initio*. 'No lawful thing, founded on a wrongful act, can be supported.' Luttin *v.* Benin, 11 Mod. 50; Ilsley *v.* Nichols, 12 Pick. 270. The watch, although liable to attachment if it had been taken by the defendant when not connected with the person of the plaintiff, was wrongfully seized, and cannot now be held under the attachment."

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to attachment, except so long as it is in actual use in the discharge of such duty. Thus, where a steamboat was attached, which was ordinarily employed by her owner in transporting the mail between New Orleans and Mobile, but at the time of the attachment was not so engaged, and had not a mail on board; her connection with the mail service was urged, as a ground for releasing her from the attachment, because the seizure was a violation of the act of Congress against obstructing the mails; but this position was overruled, and the attachment sustained.[1] And so it was held in regard to the rolling stock of a railroad.[2]

§ 253. It is not necessary that the defendant's property, in order to be subject to attachment, should be in his possession. It may be attached wherever found.[3]

§ 253 *a*. Personal property found in the defendant's possession is presumed to be his, if nothing appear to the contrary, and may and should be attached as such.[4] If an officer omit to attach it when so found, and when its attachment is necessary for the plaintiff's security, he cannot be excused, unless he prove that, notwithstanding such appearances, the property was not in fact the defendant's, — in which case the burden of proof rests upon the officer; or unless, where there were reasonable grounds to suspect that the defendant was not the owner, the plaintiff refused — what the officer in such cases has always a right to demand[5] — to indemnify the officer for any mistake he might make in conforming to the plaintiff's direction.[6] In an action against an officer for such an omission the burden of proof of damage is upon the plaintiff; damage cannot be inferred.[7]

[1] Parker *v.* Porter, 6 Louisiana, 169. In Massachusetts the question was raised whether the boat, cable, and anchor of a vessel could be attached and separated from the vessel. The court said that this might depend upon the situation of those articles in relation to the vessel. If taken when in use and necessary to her safety, the taking would subject the party taking them to damages. But if the vessel were at a wharf, and her cable and anchor and boat not in use, there was no reason why they might not as well be taken as the harness of a carriage, or the sails and rigging of a vessel when separated from the hull and laid up on shore. Briggs *v.* Strange, 17 Mass. 405.

[2] Boston, C. & M. R. R. Co. *v.* Gilmore, 37 New Hamp. 410.

[3] Graighle *v.* Notnagle, Peters, C. C. 245; Livingston *v.* Smith, 5 Peters, 90.

[4] Killey *v.* Scannell, 12 California, 73.

[5] Bond *v.* Ward, 7 Mass. 123; Sibley *v.* Brown, 15 Maine, 185; Smith *v.* Cicotte, 11 Michigan, 383; Ranlett *v.* Blodgett, 17 New Hamp. 298; Chamberlain *v.* Beller, 18 New York, 115.

[6] Bradford *v.* McLellan, 23 Maine, 302.

[7] Wolfe *v.* Dorr, 24 Maine, 104.

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§ 254. The possession of personal property, though an *indicium* of ownership, does not render it liable to attachment for the debt of the possessor who is not the owner, unless, perhaps, his possession be fraudulent and intended for colorable purposes.[1] Thus, where a son purchased a farm and stocked it, with a view to furnishing a home for an indigent father, and permitted the father to reside and labor there, the products of the farm were held not subject to attachment for the father's debts.[2] So, where one delivers to a workman materials to be manufactured; the article into which the materials are wrought cannot, when finished, be attached as the property of the workman, even though he should have put into it materials of his own.[3]

§ 255. II. *Requisites of a valid Attachment of Personalty.* When an attachment is delivered to an officer, no lien on the defendant's property is thereby created, but a levy is necessary;[4] and the first levy obtains the first right to satisfaction,[5] unless, as in some States, all the defendant's creditors are allowed to come in and share equally the avails of the first attachment. Hence the necessity that the officer should proceed at once with the execution of the writ. And as unnecessary delay in completing the attachment might open the way for other officers, having other writs, to seize the property, the first attaching officer should continue the execution of the process, with as little intermission as possible, until his duty is completed.

§ 255 *a*. What will constitute a levy as against the defendant, is a different question from what will constitute one as against third persons. A levy may be good as against the former, that would not as against the latter. But this distinction is not based upon any difference in the legal requisites of a levy, but on the fact that the conduct of the defendant, either by positive or negative acts, may amount to a waiver, or an estoppel, or agreement that that shall be a levy which, without such conduct, would not be sufficient.[6] In either case, however, the general principle may

[1] Moon v. Hawks, 2 Aikens, 390; Walcot v. Pomeroy, 2 Pick. 121.
[2] Brown v. Scott, 7 Vermont, 57.
[3] Stevens v. Briggs, 5 Pick. 177; Gallup v. Josselyn, 7 Vermont, 334.
[4] Ante, § 221.
[5] Crowninshield v. Strobel, 2 Brevard, 80; Robertson v. Forrest, Ibid. 466; Bethune v. Gibson, Ibid. 501; Crocker v. Radcliffe, 3 Ibid. 23.
[6] Taffts v. Manlove, 14 California, 47.

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be laid down, that the acts of the officer, as to asserting his rights, and devesting the possession of the defendant, should be of such character as would subject him to an action as a trespasser, but for the protection of the process.[1]

§ 256. An officer, in attaching personalty, must actually reduce it to possession, so far as, under the circumstances, can be done;[2] though in doing so, it is not necessary that any notoriety should be given to the act, in order to made it effectual.[3] What is an actual possession, sufficient to constitute an attachment, must depend upon the nature and position of the property. In general, it may be said, that it should be such a custody as will enable the officer to retain and assert his power and control over the property, so as that it cannot probably be withdrawn, or taken by another, without his knowing it.[4]

In Connecticut, a case is reported, where the doctrine is laid down, that, to effect a valid attachment of goods, the officer must have the *actual* possession of them, as contradistinguished from a *constructive* possession. The facts of the case were these: A., having an attachment against B., went to levy it on a barouche that was in B.'s carriage-house, and obtained, for that purpose, the key of the house. C., having also an attachment against B., went near the house, and concealed himself. When A. opened the door, he declared that he attached all the carriage and harness in the house; but before he actually touched the carriage, C. sprang in and seized it. The court sustained the attachment made by C., on the following grounds: "The only object of attachment is to take out of the defendant's possession, and to transfer into the custody of the law, acting through its legal officer, the goods attached, that they may, if necessary, be seized in execution, and be disposed of and delivered to the purchaser. Hence, the legal doctrine is firmly established, that to constitute an attachment of

[1] Beekman *v.* Lansing, 3 Wendall, 446; Westervelt *v.* Pinkney, 14 Ibid. 123; Camp *v.* Chamberlain, 5 Denio, 198; Goode *v.* Longmire, 35 Alabama, 668.

[2] Lane *v.* Jackson, 5 Mass. 157; Ashmun *v.* Williams, 8 Pick. 402; Lyon *v.* Rood, 12 Vermont, 233; Taintor *v.* Williams, 7 Conn. 271; Hollister *v.* Goodale, 8 Ibid. 332; Odiorne *v.* Colley, 2 New Hamp. 66; Huntington *v.* Blaisdell, 2 Ibid. 317; Dunklee *v.* Fales, 5 Ibid. 527; Chadbourne *v.* Sumner, 16 Ibid. 129; Blake *v.* Hatch, 25 Vermont, 555; Gale *v.* Ward, 14 Mass. 352; Stockton *v.* Downey, 6 Louisiana Annual, 581; Woodworth *v.* Lemmerman, 9 Ibid. 524; Learned *v.* Vandenburgh, 7 Howard Pract. R. 379.

[3] Hemmenway *v.* Wheeler, 14 Pick. 408; Tomlinson *v.* Collins, 20 Conn. 364.

[4] Hemmenway *v.* Wheeler, 14 Pick. 408.

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goods the officer must have *the actual possession and custody*. That the plaintiff was at the door of the carriage-house, with a writ of attachment in his hand, only proves an intention to attach. To this, no accession is made by the lawful possession of the key, and the unlocking of the door. Suppose, what does not appear, that the key was delivered to him by the owner of the carriage, that he might attach the property; this would be of no account. He might have the constructive possession, which, on a sale, as between vendor and vendee, would be sufficient; but an attachment can only be made by the taking of actual possession. As little importance is attached to the unlocking of the door, and the declaration that the plaintiff attached the carriage. This was not a touching of the property, or the taking of the actual possession. The removal of an obstacle from the way of attaching, as the opening of the door, is not an attachment, nor was the verbal declaration. An attachment is an act done; and not a mere oral annunciation. From these various acts, taken separately or conjointly, the plaintiff did not obtain the possession and custody of the carriage, and therefore he did not attach the property."[1]

The views expressed in this case, it is believed, are not sustained in any other State; but, on the contrary, the decisions seem to be with unanimity the other way. It has been repeatedly held, that personal property may be attached without the officer touching it.

In Maine, the doctrine was laid down that, to constitute an attachment, it is not necessary that the officer should handle the goods attached, but he must be in view of them, with the power of controlling them, and of taking them into his possession. Therefore, where it appeared that the officer went upon premises of the defendant with an attachment, and before leaving, declared to a person who was accustomed to work there, that he had attached the property there, and requested the person to forbid any one taking the things away, but did not give the property into the custody of that person, and then left, and did not return to take the property into his possession; the court held, that the attachment might be sufficient, if followed by the continual presence of the officer, or of some one on his behalf.[2]

In New Hampshire, the court say that a valid attachment is not

[1] Hollister v. Goodale, 8 Conn. 332. [2] Nichols v. Patten, 18 Maine, 231.

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effected, unless the articles are taken into the officer's actual custody, or are placed under his exclusive control; by which actual custody and exclusive control they do not mean that he must touch and remove every article before an attachment can be deemed valid, but that the articles must be so within his power as to enable him to touch or remove them.[1] In a subsequent case in the same State, where an officer was in a house, levying an attachment on furniture, and another officer entered a chamber of the house not yet reached by the first, and attached the articles therein, the court held the proceedings of the first officer to amount to an attachment of the whole effects, and that the second officer's attachment was illegal; and they say, "The whole articles must doubtless be within the power of the officer. That is, they must not be inaccessible to him by their distance, or by being locked up from his reach in an apartment not under his control; or by being so covered with other articles, or so in the custody of another person, that the officer cannot see and touch them."[2] Again, the same court held, that, to make an attachment, the officer must take possession of the goods; but that it is not necessary that the goods should be removed; but they must, in all cases, be put out of the control of the debtor.[3]

In Vermont, it is unnecessary that the officer should actually touch the property, but he must have the custody or control of it, in such a way as either to exclude all others from taking it, or, at least, to give timely and unequivocal notice of his own custody.[4] Therefore, where an officer attaching goods in a building, fastened the windows, locked the door, and took the key into his possession, it was held a sufficient taking possession of the goods, as respects subsequent attachments, even though he carelessly failed to secure every avenue to the room, and through one unguarded avenue another officer entered and seized the property.[5]

In Massachusetts, the necessity for an actual handling of the property in order to effect an attachment is not recognized. Thus, where the officer went with a writ and took possession of the defendant's store, and locked it up; it was held to be a sufficient

[1] Odiorne v. Colley, 2 New Hamp. 66; Morse v. Hurd, 17 Ibid. 246.
[2] Huntington v. Blaisdell, 2 New Hamp. 317.
[3] Dunklee v. Fales, 5 New Hamp. 527.
[4] Lyon v. Rood, 12 Vermont, 233. In this case the above-cited case of Hollister v. Goodale, 8 Conn. 332, is severely condemned.
[5] Newton v. Adams, 4 Vermont, 437; Slate v. Barker, 26 Ibid. 647.

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attachment of the goods in the store, and valid against a subsequent attachment or mortgage thereof.[1]

But in California, where a sheriff went, a few minutes after midnight, to a closed store, and, without obtaining admittance, stationed himself at the front door, and an assistant at the back door, so that no one could go in or come out, but did not declare that he levied on the contents of the store, and did not know what the contents were; it was held, that no levy was effected, as against an assignment by the defendant in insolvency, made after those acts of the sheriff, and before he obtained an entrance into the store. The court said: "It is too plain for argument that there can be no levy where the officer does not even know the subject of the levy. As well might a sheriff stand in the street and levy on the contents of a banking house, as to stand in a store door at midnight, and claim that by merely standing there, and preventing any person from coming into the store, he had levied on the contents, whatever they were, of the store; and this without having any knowledge of the general nature of the stock, much less of the particular description or value."[2]

§ 257. In all such cases, however, if the officer have not the property under his control, or, so having, he abandon it, the attachment is lost. Therefore, where an officer having an attachment, got into a wagon in which the defendant was riding, and to which a horse was harnessed, and told the defendant that he attached the horse, and then rode down street with the defendant, without exercising any other act of possession, and left the horse with the defendant, upon his promising to get a receipter for it; the court held, that, as the horse had not been under the officer's control for a moment, or if it could be considered that he had had an instantaneous possession, it was as instantaneously abandoned, there was no attachment.[3]

§ 258. With regard to heavy and unmanageable articles, there seems to be no necessity for an actual handling to constitute an attachment. Thus, an officer went with an attachment, within view of a quantity of hay in a barn, and declared in the presence

[1] Denny *v.* Warren, 16 Mass. 420; Gordon *v.* Jenney, Ibid. 465; Shephard *v.* Butterfield, 4 Cushing, 425; Naylor *v.* Dennie, 8 Pick. 198.

[2] Taffts *v.* Manlove, 14 California, 47

[3] French *v.* Stanley, 21 Maine, 512.

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of witnesses, that he attached the hay, and posted up a notification to that effect on the barn-door; and it was held to be a valid attachment.[1] So, where an officer attached a parcel of hewn stones, lying scattered on the ground, by going among and upon them, and declaring that he attached them, and placed them in charge of the plaintiff; but made no removal of them, nor gave any notice to any third persons of the attachment, nor took any other mode of giving notoriety to the act; it was held to be a valid attachment, because it was manifest that the officer did not intend to abandon the attachment, and that the measures he took, considering the bulky nature and the situation of the property, were sufficient.[2] So, where an officer attached a quantity of iron ore lying on the surface of the ground, by informing the clerk and workmen of the defendant of the attachment, but did not remove the ore; and in consequence of his declaration the workmen were dismissed, and the defendant's operations ceased, and the facts became generally known and talked of; and it appeared that the removal of the ore would have been attended with great expense and serious injury to the property; it was held, that the attachment was valid; that where the removal of attached property would result in great waste and expense, it may be dispensed with; and that in such case the continued presence of the officer with the property, in person or by agent, is not necessary; it being sufficient if he exercise due vigilance to prevent its going out of his control.[3] The doctrine thus stated, as dispensing with the actual reduction to possession of ponderous articles, was sought, but unsuccessfully, to be applied to an attachment of ripe corn and potatoes in a field, of which an officer returned an attachment, though he had only gone into the field, and appointed an agent to keep the corn and potatoes. It was held, that this was no attachment, and that it was the officer's duty to have severed the produce from the soil, and reduced it to his possession.[4]

§ 259. The rule requiring the officer to reduce to his possession personal property attached by him, does not extend to a case in which an attachment is authorized of that which in its nature is incapable of being taken into possession. Such is the case of stock

[1] Merrill v. Sawyer, 8 Pick. 397.
[2] Hemmenway v. Wheeler, 14 Pick. 408; Polley v. Lenox Iron Works, 4 Allen, 329.
[3] Mills v. Camp, 14 Conn. 219; Bicknell v. Trickey, 34 Maine, 273.
[4] Heard v. Fairbanks, 5 Metcalf, 111.

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in a bank or other corporation. There, it is sufficient for the officer to take the steps required by the law under which he acts, and to describe the property as so many shares of the particular stock owned by the defendant, and a sale by such a description will carry the title.[1]

[1] Stamford Bank v. Ferris, 17 Conn. 259.

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CHAPTER XI.

OF SIMULTANEOUS, SUCCESSIVE, CONFLICTING, AND FRAUDULENT ATTACHMENTS.

§ 260. A COMMON occurrence in the use of the remedy by attachment is, for a number of writs, in favor of different plaintiffs, to be placed, at the same time, or in quick succession, in the hands of officers, against the same defendant, and served on the same property, simultaneously, or at short successive intervals. As such cases usually occur where the defendant is in failing circumstances, or is about to commit, or has perpetrated some fraud, and the property levied on is supposed to be the only available resource for the satisfaction of his creditors, it is important to ascertain the rules which are to decide between interests which, under such circumstances, are almost certain to come in conflict. This subject is of no importance where, as in some States, the first attachment holds the property, not to the exclusion of all subsequent ones, but for the benefit of all creditors of the defendant who come in and prove their demands, and thereby become entitled to share with the first attacher the avails of his diligence; but wherever, as in the large majority of the States, the writs hold in the order of their service, its importance is evident.

§ 261. In general, there is no doubt that the law admits of no fractions of a day; but this rule is subject to exceptions, when necessary to determine priority of right. The case of several attachments levied on the same property on the same day is one of the exceptions. There, it is held, that they will stand according to the actual time of service, and if a judgment be obtained by a junior attacher in advance of a senior, it will not destroy the priority of lien acquired by the latter.[1]

§ 262. The rights of attaching creditors, who, as against their

[1] Tufts v. Carradine, 3 Louisiana Annual, 430. In Pennsylvania, however, it is held, that among all the attachments which go into the sheriff's hands, and are executed, on the same day, there is no preference. Yelverton v. Burton, 26 Penn. State, 351.

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common debtor, have equal claims to the satisfaction of their debts, must depend on strict law; and if one loses a priority once acquired, by any want of regularity or legal diligence in his proceedings, it is a case where no equitable principles can afford him relief; where the equities are equal; and where the right must be governed by the rule of law.[1] It has been held, therefore, that, as against subsequent attaching creditors, the rendition of a judgment in due form and course of law, and the issuing of an execution on that judgment, and duly charging the property therewith, is as necessary as the attachment itself, to entitle the plaintiff to priority of satisfaction; and that any departure by him from the course prescribed by law for establishing his right to such satisfaction will discharge his lien under the attachment, and subject the whole attached property to the claims of the subsequent attachers. Hence it was held in Vermont, that a confession of judgment by the defendant, anterior to the time when the action would have been regularly triable,[2] or an appearance and trial, resulting in a judgment for the plaintiff, before the return day of the writ,[3] was a dissolution of the plaintiff's lien under his attachment, as against subsequent attachments. So, too, where there were several successive attachments, and the first attacher, having a claim large enough to absorb all the property attached, by agreement with the defendant took all the property in satisfaction of his debt, and discontinued his suit; it was held, that, as against the subsequent attachers, who perfected their lien by judgment and execution, he acquired no title to the property.[4]

It will be remarked, that, in all these instances, there was held to be a substantial departure from the legal mode prescribed for enabling a party to obtain the benefit of his attachment. This would probably be considered as a different matter from mere irregularities; for it is well settled that, though such exist in the proceedings of one attaching creditor, other attaching creditors cannot make themselves parties to the proceedings for the purpose of defeating them on that account.[5]

[1] Suydam v. Huggeford, 23 Pick. 465.
[2] Hall v. Walbridge, 2 Aikens, 215.
[3] Murray v. Eldridge, 2 Vermont, 388.
[4] Brandon Iron Co. v. Gleason, 24 Vermont, 228; Cole v. Wooster, 2 Conn. 203.
[5] Kincaid v. Neall, 3 M'Cord, 201; Camberford v. Hall, Ibid. 345; McBride v. Floyd, 2 Bailey, 209; Van Arsdale v. Krum, 9 Missouri, 393; Walker v. Roberts, 4 Richard-

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§ 263. Neither the issue of an attachment,[1] nor its lodgement in the hands of an officer,[2] confers any rights upon the plaintiff in the defendant's property. It is only when the writ is served, that, as between plaintiff and defendant, and generally as between different plaintiffs, its lien takes effect.[3] Hence, when several attachments against the same person are simultaneously served on the same property, they will be entitled to distribute among them the proceeds of the attached property, or the funds in the hands of garnishees. This distribution is not in proportion to the amount claimed under each attachment, but according to the number of the writs, each being entitled to an aliquot part; with this qualification, however, that, if the share of any plaintiff should be more than sufficient to satisfy his demand, the surplus must be appropriated to any other of the demands which is not paid in full by its distributive share.[4]

This rule was applied in Massachusetts, not only to the case of simultaneous attachments by different officers,[5] but where the writs were in the hands of the same officer, and were delivered to him at different times, but served together.[6] In Kentucky, however, it was determined, that, though in the case of distinct officers, the first levy gives the prior lien, yet where several attachments *against the same fund* come, in succession, to the hands of the same officer or his deputies, it is the duty of the officer to execute them in the order in which they were received. And although when the process comes to the hands of different deputies, this order of

son, 561; Ball *v.* Clafflin, 5 Pick. 303; *In re* Griswold, 13 Barbour, 412; Bank of Augusta *v.* Jaudon, 9 Louisiana Annual, 8.

[1] Mears *v.* Winslow, 1 Smedes & Marshall, Ch'y R. 449; Williamson *v.* Bowie, 6 Munford, 176; Wallace *v.* Forrest, 2 Harris & McHenry, 261.

[2] Crowninshield *v.* Strobel, 2 Brevard, 80; Robertson *v.* Forrest, Ibid. 466; Bethune *v.* Gibson, Ibid. 501; Crocker *v.* Radcliffe, 3 Ibid. 23.

[3] Gates *v.* Bushnell, 9 Conn. 530; Sewell *v.* Savage, 1 B. Monroe, 260; Nutter *v.* Connet, 3 Ibid. 199; Fitch *v.* Waite, 5 Conn. 117; Crowninshield *v.* Strobel, 2 Brevard, 80; Robertson *v.* Forrest, Ibid. 466; Bethune *v.* Gibson, Ibid. 501; Crocker *v.* Radcliffe, 3 Ibid. 23; Pond *v.* Griffin, 1 Alabama, 678; McCobb *v.* Tyler, 2 Cranch, C. C. 199; Grigsley *v.* Love, Ibid. 413; Burkhardt *v.* McClellan, 15 Abbott Pract. R. 243; Taffts *v.* Manlove, 14 California, 47.

[4] Shove *v.* Dow, 13 Mass. 529; Sigourney *v.* Eaton, 14 Pick. 414; Rockwood *v.* Varnum, 17 Ibid. 289; Durant *v.* Johnson, 19 Ibid. 544; Davis *v.* Davis, 2 Cushing, 111; Thurston *v.* Huntington, 17 New Hamp. 438; Campbell *v.* Ruger, 1 Cowen, 215; Nutter *v.* Connet, 3 B. Monroe, 199. This rule, however, does not obtain in North Carolina and Tennessee, where the distribution is made *pro rata*. Hill *v.* Child, 3 Devereux, 265; Freeman *v.* Grist, 1 Devereux & Battle, 217; Porter *v.* Earthman, 4 Yerger, 358; Love *v.* Harper, 4 Humphreys, 113.

[5] Shove *v.* Dow, 13 Mass. 529. [6] Rockwood *v.* Varnum, 17 Pick. 289.

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service may, without fault, happen to be reversed, the court, having the fund in its possession under all the attachments, should distribute it according to the rule which should have governed the execution of the process.[1]

§ 264. Where different writs are in the hands of the same officer, there need be no difficulty in ascertaining whether their service was simultaneous; but when different officers are employed, each intent on obtaining priority, questions of difficulty may occur. A singular case of this description is reported in Massachusetts, where two officers held attachments against the same defendant. One returned his writ served "at one minute past 12 o'clock, A. M.," the other that he served his writ "immediately after midnight" on the same day. The court held, that each of them made the attachment as soon as it could be done after twelve o'clock at night, and that it was impossible to say that either had the priority.[2]

§ 265. Where several writs against the same defendant were served in the course of the same day, and the returns on all, except one, stated the time of the day when the service was made, and that one stated only a service on that day; it was held, that it was neither matter of legal presumption, nor construction, that the latter writ was served at the same time with any of the others. But parol evidence was admitted to show at what time of the day specified in the return the service was in fact made; such evidence being regarded as entirely consistent with the return.[3]

In a similar case where an officer returned an attachment as made at 12 o'clock, noon, on a certain day, it was considered as prior in point of time to another attachment returned as made on the same day, indefinitely, without specifying any particular hour. And it was held in that case, that no amendment of the latter return was admissible, which would destroy or lessen the rights of third persons previously acquired.[4]

§ 265 *a*. Where several writs are executed about the same time,

[1] Kennon *v.* Ficklin, 6 B. Monroe, 414; Clay *v.* Scott, 7 Ibid. 554; Callahan *v.* Hallowell, 2 Bay, 8. See Thurston *v.* Huntington, 17 New Hamp. 438.

[2] Shove *v.* Dow, 13 Mass. 529.

[3] Brainard *v.* Bushnell, 11 Conn. 16.

[4] Fairfield *v.* Paine, 23 Maine, 498; Taylor *v.* Emery, 16 New Hamp. 359.

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and so near together that but for the terms of the returns thereon they would be considered as having been simultaneously made, it is held, in New Hampshire, that the officer may indicate the order in which he served them, by returning his attachment under one as subject to an attachment under another; and that if he so returned them in the order in which he received them, he gave them their rightful precedence.[1]

§ 266. When different officers make attachments so nearly at the same time that it is difficult to determine the question of priority between them, they may, it seems, settle the dispute by a division of the property, which will be regarded as binding on them, and as precluding either from subsequently raising the question of priority. And if, in such case, one sell the whole of the property and apply the proceeds to the satisfaction of the execution held by him, the other will be entitled to maintain trover against him for his portion, and in order thereto need not prove that, in fact, his was the first attachment.[2]

§ 267. Neither the actual custody nor the exclusive control of the same articles of personal property can, at the same time, be in two distinct persons; and therefore, as possession of goods by an officer is an indispensable requisite to a valid attachment of them, it follows that when an officer has levied an attachment on goods, and has them in his custody, no other officer can seize them under another writ; for in order to attach, he must lawfully take possession of them; but this he cannot do, since the first attaching officer has, by his prior attachment, a special property in them, and they are in the custody of the law, and it would introduce confusion to admit of several officers contending for the possession of attached goods.[3] And it matters not that the first attaching officer had levied upon more than was sufficient to satisfy the writ under which he acted.[4] The same rule prevails where the property is not in the actual custody of the first officer, but in the

[1] Thurston *v.* Huntington, 17 New Hamp. 438.

[2] Lyman *v.* Dow, 25 Vermont, 405.

[3] Watson *v.* Todd, 5 Mass. 271; Vinton *v.* Bradford, 13 Ibid. 114; Burlingame *v.* Bell, 16 Ibid. 318; Odiorne *v.* Colley, 2 New Hamp. 66; Moore *v.* Graves, 3 Ibid. 408; Strout *v.* Bradbury, 5 Maine, 313; Burroughs *v.* Wright, 16 Vermont, 619; Lathrop *v.* Blake, 3 Foster, 46; Walker *v.* Foxcroft, 2 Maine, 270; Oldham *v.* Scrivener, 3 B. Monroe, 579; Robinson *v.* Ensign, 6 Gray, 300; Harbison *v.* McCartney, 1 Grant, 172.

[4] Vinton *v.* Bradford, 13 Mass. 114.

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hands of a receipter, to whom he has intrusted it. The possession of the receipter being that of the officer, cannot be violated by taking the goods from his custody under another attachment.[1]

§ 268. If an officer attach property, and it is subsequently taken from his possession by another officer, under another attachment against the same defendant, and the property is sold and its avails applied by the second officer upon the execution obtained in the second suit, and the first officer sue the second for the trespass, his right to recover anything more than nominal damages will depend on his liability for the property to the plaintiff in whose favor he attached it; and if that liability has been lost by the failure of the plaintiff to perfect the lien of his attachment, there can be no recovery against the second attaching officer for anything more than nominal damages. In such case the first officer cannot recover upon the ground of any liability on his part to the defendant, since the act of the second officer was justifiable, so far as the defendant is concerned, and the first officer is not liable over to him for the property.[2]

§ 269. If it be desired to lay an attachment upon property already attached, and in an officer's custody, the writ should be delivered to, and executed by, him; when it will be available to hold the surplus, after satisfying the previous attachment, or the whole, if that attachment should be dissolved. In such case no overt act on the part of the officer is necessary to effect the second levy, but a return of it on the writ will be sufficient.[3] So, where the property is in the hands of a bailee, the officer who placed it there may make another attachment, without the necessity of an actual seizure, by making return thereof, and giving notice to the bailee.[4]

§ 270. These rules refer to seizures of goods, and not to cases where property is attached by one officer, by garnishment of the individual in whose possession it may be, and afterwards by another

[1] Thompson *v.* Marsh, 14 Mass. 269.

[2] Goodrich *v.* Church, 20 Vermont, 187.

[3] Turner *v.* Austin, 16 Mass. 181; Tomlinson *v.* Collins, 20 Conn. 364; Rogers *v.* Fairfield, 36 Vermont, 641.

[4] Knap *v.* Sprague, 9 Mass. 258; Whittier *v.* Smith, 11 Ibid. 211; Odiorne *v.* Colley, 2 New Hamp. 66; Whitney *v.* Farwell, 10 Ibid. 9; Tomlinson *v.* Collins, 20 Conn. 364.

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officer, by actual seizure and removal thereof from the garnishee's possession. This, though a proceeding not by any means to be approved, and, where the writs issue from different jurisdictions, wholly inadmissible, yet may, it seems, be done, where the two writs proceed from the same jurisdiction. The officer making the seizure of the goods, will hold them subject to the prior lien of the garnishment. He must keep them until the result of the garnishment is ascertained; when, if the garnishee be charged in respect of them, the officer will be bound to restore them to him and suffer them to be sold; and if he fail to do so he will be liable to the garnishee,[1] or to the plaintiff in the garnishment.[2]

§ 271. If an officer suffer his possession of attached property to be lost, it may be attached by another officer, though the latter may be aware of the former attachment having been made, if his knowledge extend not beyond that fact.[3] For it does not follow, that, because he knows an attachment was at one time made, he knows that it still exists; on the contrary, he may well infer, from finding the property no longer in the possession of the officer who first attached it, that the prior attachment had been discharged. But if he know that there is a subsisting attachment, — although the defendant might, at the time, by the permission of the bailee, to whom the property had been intrusted, be in possession of it, — he cannot acquire a lien by attaching it.[4] After he has made a levy, however, notice to him that a prior attachment exists will not affect the validity of the levy.[5]

§ 272. The existence of the proceeding by attachment could hardly fail to give rise to fraudulent attempts to obtain preference, where the property of a debtor is insufficient to satisfy all the attachments issued against him. When it transpires that there are circumstances justifying resort to this remedy, the creditors of an individual usually press forward eagerly in the race for precedence, sometimes to the neglect of important forms in their proceedings, and sometimes without due regard to the rights of others. On such occasions, too, notwithstanding the safeguards generally

[1] Burlingame *v.* Bell, 16 Mass. 318; Swett *v.* Brown, 5 Pick. 178.
[2] Rockwood *v.* Varnum, 17 Pick. 289.
[3] Chadbourne *v.* Sumner, 16 New Hamp. 129.
[4] Bagley *v.* White, 4 Pick. 395; Young *v.* Walker, 12 New Hamp. 502.
[5] Bruce *v.* Holden, 21 Pick. 187.

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thrown around the use of this process, and in violation of the sanctity of the preliminary oath, it has been found that men, in collusion with the debtor, or counting on his absence for impunity, have attempted wrongfully to defeat the claims of honest creditors, by obtaining priority of attachment, on false demands. There is, therefore, a necessity — apparent to the most superficial observation — for some means by which all such attempts to overreach and defraud, through the instrumentality of legal process, may be summarily met and defeated. Hence provision has been made in the statutes of some States for this exigency, and where such is not the case the courts have broken the fetters of artificial forms and rules, and attacked the evil with commendable spirit and effect.

§ 273. As before remarked,[1] whatever irregularities may exist in the proceedings of an attaching creditor, it is a well-settled rule that other attaching creditors cannot make themselves parties to those proceedings, for the purpose of defeating them on that account.[2] But where an attachment is based on a fraudulent demand, or one which has in fact no existence, it is otherwise, as will appear from a review of the action of courts of a high order of learning and ability.

§ 274. In North Carolina it was held, in the case of several attachments against the same defendant, levied on the same property, that a junior attacher could not impeach a judgment obtained by a senior attacher, on the ground that when the attachment of the latter was obtained, the defendant's debt to him was not due;[3] and in Iowa, that a junior attacher could not intervene in a prior attachment suit, to show that it was prosecuted by collusion between the parties thereto, for the purpose of hindering, delaying, and defrauding the defendant's creditors; but that relief in such case could only be administered by a court of equity.[4] But these decisions are inconsistent with the general current of decision elsewhere, as we shall now proceed to show.

[1] Ante, § 262.

[2] Kincaid *v.* Neall, 3 M'Cord, 201; Camberford *v.* Hall, Ibid. 345; M'Bride *v.* Floyd, 2 Bailey, 209; Van Arsdale *v.* Krum, 9 Missouri, 397; Walker *v.* Roberts, 4 Richardson, 561; Ball *v.* Claflin, 5 Pick. 303; *In re* Griswold, 13 Barbour, 412; Bank of Augusta *v.* Jaudon, 9 Louisiana Annual, 8; Fridenburg *v.* Pierson, 18 California, 152; Ward *v.* Howard, 12 Ohio State, 158.

[3] Harrison *v.* Pender, Busbee, 78.

[4] Whipple *v.* Cass, 8 Iowa, 126.

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§ 275. In New Hampshire, so far as we have been enabled to discover, there is no statute authorizing an attaching creditor to impeach the good faith of previous attachments; but a practice prevails there, which effectually opens the door for such salutary investigations; as is exhibited by the following case. One sued out an attachment, and caused it to be levied. Afterwards, creditors of the same defendant, who had subsequently caused the same property to be attached, suggested to the court, that the suit of the prior attacher was prosecuted collusively between him and the defendant, for the purpose of defrauding the creditors of the latter, and that there was, in fact, nothing due from the defendant to the plaintiff. Thereupon, — the creditors making the suggestion, having given security to the plaintiff to pay all such costs as the court should award on account of their interference in the suit, — the court ordered that the plaintiff should make his election to dissolve his attachment, or consent to try, in an issue between him and the creditors, the question whether his suit and attachment were collusive. The plaintiff elected the latter, and an issue was formed for the purpose, between the plaintiff and the creditors, and tried by a jury, who found that the suit was prosecuted collusively, for the purpose of defrauding creditors. The court then ordered all further proceedings to be stayed; from which order the plaintiff appealed to the Superior Court. That court, in sustaining the appeal, differed from the court below only as to the *manner* of arriving at the result; and held, that if the creditors should give security to pay all the costs which the plaintiff might recover, they would be permitted to defend *in the name of the defendant*.[1] Afterwards the same court referred to this as a very common practice, and as in general the only mode in which a fraudulent attachment could be defeated;[2] and in a subsequent case held it to be available, as well in cases of garnishment, as in those of levy on specific property.[3] It was also held by that court, that a subsequent attacher might move to dismiss a prior attachment, on the ground that there was no such person as the plaintiff therein.[4]

In South Carolina, by the proceeding in attachment, the funds

[1] Buckman *v.* Buckman, 4 New Hamp. 319.

[2] Webster *v.* Harper, 7 New Hamp. 594; Pike *v.* Pike, 4 Foster, 384.

[3] Blaisdell *v.* Ladd, 14 New Hamp. 129. See Harding *v.* Harding, 25 Vermont, 487, for the practice in such cases, as regulated by statute in Vermont.

[4] Kimball *v.* Wellington, 20 New Hamp. 439.

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of the absent debtor are brought into court, and distributed among the several attaching creditors; and a judgment in attachment serves no other purpose than to ascertain the amount of the plaintiff's claim on the attached property, by establishing his demand against the absent debtor; and no execution can be issued on the judgment. When the attached fund is distributed, the judgment is *functus officio*, unless the defendant shall have entered special bail, or, under the Act of 1843, executed a warrant of attorney and been admitted to defend the action, on the conditions prescribed by the Act.[1] There it is settled, that in making the distribution of the moneys arising from the attachments, the court can and should inquire into the several causes of action, and may inspect its judgments to prevent fraud and injustice. In effecting this, the consent or opposition of the parties to the judgment is disregarded, for they may combine to effect the fraud. The acquiescence of the defendant in the plaintiff's illegal proceedings, affords no protection against an inquiry into the judgment, when that is necessary for the protection of the rights of other creditors. Therefore, where an attachment appears to have issued on a debt not due, it will be set aside in favor of a junior attachment upon a debt that was due.[2] And the same position was sustained in California,[3] and in Mississippi.[4]

The Court of Appeals of Virginia have taken the same salutary course, and held, that a junior attaching creditor may come in and defend against a senior attachment, by showing that the debt for which the senior attachment was taken out had been paid.[5]

In Georgia, this subject received a full examination, and it was held, upon general principles, and without any aid from statutory provisions, that a judgment in an attachment suit may be set aside, in a court of law, upon an issue suggesting fraud and want of

[1] Walker *v.* Roberts, 4 Richardson, 561.

[2] Walker *v.* Roberts, 4 Richardson, 561; Ralph *v.* Nolan, 1 Rice's Digest of S. C. Reports, 77. The Supreme Court of Connecticut, however, in a case which came before it between conflicting attaching creditors, where the claim of one was resisted by the others, because it embraced, besides a debt actually due, an amount intended to cover and secure a liability which the plaintiff was under as an indorser for the accommodation of the defendant, decided that, in the absence of fraud, such a combination of claims did not make the attachment void, and that the attachment should be sustained as to the debt really due, but not as to the rest. Ayres *v.* Husted, 15 Conn. 504.

[3] Patrick *v.* Montader, 13 California, 434; Davis *v.* Eppinger, 18 Ibid. 378

[4] Henderson *v.* Thornton, 37 Mississippi, 448.

[5] M'Cluny *v.* Jackson, 6 Grattan, 96.

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consideration in it, tendered by a junior attaching creditor of the common defendant.[1]

[1] Smith *v.* Gettinger, 3 Georgia, 140. The case arose upon a motion by the junior judgment creditor to set aside the senior judgment, for alleged want of consideration or cause of action. The whole facts are best shown in the opinion of the court, delivered by NISBET, J.

"Upon a rule against the sheriff for the distribution of money raised by attachment, the plaintiff in error, holding an attachment lien, junior to that of the defendants, sought to set aside their lien. The attachment claim of both parties has been reduced to judgment. For the purpose of vacating the judgment of the defendants, and thereby defeating their older lien, the plaintiff in error tendered to them in the court below the following issues: —

"1. That G. & B. (the defendants in error) have no judgment against H. (the defendant in attachment), good and sufficient in law; nor did G. & B. have at the time of suing out their attachment, any cause of action against said H. as alleged.

"2. That said judgment in favor of said G. & B., had upon said attachment, is, and was, without adequate consideration, and therefore void as to said S. (the plaintiff in error).

"3. That the attachment in favor of G. & B. was sued out on a note made by one M., and not by the defendant H., and that said judgment on said attachment was had and founded on said note made by said M., and that no other evidence besides said note was produced to the jury who found said verdict in favor of G. & B.; and that therefore said judgment and attachment are of none effect as against said S

"The defendants in error demurred to these issues, and the court sustained the demurrer; to which decision the plaintiff in error excepts, and upon it assigns error. The questions made by the record appear to be these, to wit: '*is it competent for a plaintiff in attachment, holding a judgment and an attachment lien younger than the judgment and attachment lien of another plaintiff in attachment, against the same defendant, to set aside the older lien and judgment, upon the ground of want of consideration for that judgment, or upon the ground of fraud in the judgment; and if it is, can it be done by motion, and issue tendered at law?*'

"The general rule as to the effect of judgments is, that they are conclusive upon parties and privies. Parties are all such persons as were directly interested in the subject-matter, had a right to make defence, to adduce testimony, to cross-examine witnesses, to control the proceedings, and to appeal from the judgment. Privies are all persons who are represented by the parties and claim under them, all who are in privity with the parties; the term privity denoting natural or successive relationship to the same rights of property. All persons not parties or privies are regarded as strangers. Strangers are not concluded by a judgment. Brown *v.* Chaney, 1 Georgia, 410.

"Without going further into the general doctrines upon this subject, we proceed to say, that the plaintiff in error was not a party, nor a privy, to the judgment or attachment rendered in favor of G. and B. against H. He had no power, in his own right, to make a defence against it, to adduce testimony, to examine witnesses, to control the proceedings, or to enter an appeal.

"The plaintiff in error being a stranger then to this judgment, it is scarcely necessary to adduce authorities to demonstrate his right to set it aside, if prejudicial to his interest, *for fraud*. Nor is it any the more questionable, that he may set it aside as being wholly *without* consideration. But there are some authorities which relate more particularly to attachments, which have a direct relevancy to this case. [The court then review the cases on this subject in Massachusetts and Maine, and proceed.]

"These principles and these authorities establish that this attachment may be vacated, and also the judgment which is founded on it, *for fraud* — for anything that amounts to a fraud upon the rights of other creditors, whether the defendant be a party to the fraud or not. It was sought to be done in this case by an issue at law, before a jury. Can it be so done? is the remaining injury. That it may be done by a proceed-

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In New York the following case is reported. A. issued an attachment, and caused it to be levied on property of B., owned by him and a partner, not a defendant in that action, constituting the firm of B. & Co. Thereupon B. requested D., a creditor of the firm, to accept a confession of judgment from himself and copartner, and levy on the attached property, thus gaining a prior right over A. This judgment was set aside by the court, as being intended to defraud creditors. Thereupon D. issued an attachment on the partnership debt, and levied it on the property already attached; having done which, he took no further step in the action for more than four months; thus leaving his attachment dormant, and apparently to be used only against other creditors. After the levy of D.'s attachment, he went on selling goods to B. & Co., and required and obtained security on those sales. These facts, taken in connection with the design of the previous confession of judgment, were held sufficient to justify the inference that D.'s attachment was levied, not to secure the debt due him, but to hinder and delay the collection of A.'s demand, and that D.'s attachment would be dropped if A.'s claim were out of the way; and the court, acting on this inference, on motion vacated D.'s attachment.[1]

In Michigan, where a plaintiff took judgment for the demand upon which his attachment was obtained, and also for another demand which became due after his suit was instituted; it was held, that his judgment was fraudulent as against, and was postponed to the claim of, a subsequent attaching creditor.[2]

In Ohio, the right of a subsequent attacher to object to a prior

ing in equity, by a creditor whose debt is not reduced to judgment, even, I presume there is no doubt. It may be conceded, for it has been so ruled, particularly in South Carolina, that a creditor whose debt is not reduced to judgment, cannot upon motion, set aside a judgment in attachment, for irregularity. In this case the debt of the objecting creditor is in judgment; he also has a lien upon the fund in the hands of the court for distribution. Nothing is more common in our courts, upon the distribution of money, than, upon the suggestion by one holding a junior lien that an older execution has been paid, to send that fact to be tried by a jury at law. Why may not a suggestion that there is fraud in the judgment, be tried in the same way? It is not enough to say, that the party has a remedy in equity; for over questions of fraud, the jurisdiction, by express statute, and indeed by the general law, in courts of law and equity, is concurrent. We think it is at the option of the party to move at law or go into equity. If he chooses to abide the rules of the law, the risk is his; the court has no right to turn him away. In South Carolina, it has been determined that a judgment will be set aside at the instance of a creditor, upon an issue of fraud before a court of law."

[1] Reed v. Ennis, 4 Abbott Pract. R. 393. [2] Hale v. Chandler, 3 Michigan, 531.

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attachment on the ground that the cause of action therein is one for which an attachment is not allowed by law, was recognized; but the court seemed to consider that this right could not be exercised until the question of the final disposition of the attached fund among the attachers, after all had obtained judgments, should come before the court.[1]

These cases, proceeding upon principles of strict right and justice, and fulfilling the law's aversion to every species of collusion and fraud, it is to be hoped will be regarded as authority in all other courts, and lead to the general adoption of a practice which thus summarily assails an evil that cannot be so effectively reached by any other means.

§ 276. Besides the remedy afforded in the mode pointed out in the preceding section, there is no doubt that an attaching creditor, injured by a fraudulent attachment, may maintain an action for the injury, either against the plaintiff therein, or the officer who made it with knowledge of its fraudulent character. Thus, where officer A., on Saturday afternoon, attached goods in a store, and removed part of them to another building, and then closed and locked the store, and took the key away; and early on Monday morning officer B. called on the defendant with another attachment, and the defendant showed him the goods, and B. thereupon attached them, knowing the existence of A.'s attachment; and A. sued B., in trover, for the value of the goods; it was held, that B.'s attaching the goods with the defendant's assistance, showed collusion to defeat the first attachment, and that fraud was a necessary inference from the facts, and that the action was maintainable.[2]

Of the same character is the following case: A. & B., separate creditors of C., sued out attachments against him, and levied them on his property. Afterwards D. obtained an attachment against C., and the officer returned a levy on the same property, subject to the attachments of A. & B. At a subsequent time A. & B. were desirous that the property should be sold on their writs, but D. gave written notice to the officer that he should resist the demands upon which the attachments of A. & B. were founded, as being fraudulent, and that he should object to the sale of the goods until judgment should be recovered in due course of law, and the goods be sold on execution, and that if the officer

[1] Ward *v.* Howard, 12 Ohio State, 158. [2] Denny *v.* Warren, 16 Mass. 420.

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should sell the goods on the writs, it would be at his peril. The officer, notwithstanding, sold the property, and when A. & B. obtained judgments, appropriated the proceeds to the satisfaction thereof, leaving nothing to satisfy D.'s claim; whereupon D. brought an action on the case against the officer for failing to satisfy his execution. On the trial it appeared, that in the action instituted by A. there were two demands, one of which was just, the other without any consideration and fraudulent. It was held, that embracing this fraudulent demand in the suit, made the whole action void as to D.'s right as an attaching creditor, and that the officer was liable to D.[1]

§ 277. An action on the case for conspiracy also lies in favor of a creditor, against his debtor and a third person, who have procured the property of the debtor to be attached in a suit for a fictitious debt, and applied to the payment of the judgment obtained in the action, in order to prevent creditors from obtaining payment out of the property; the creditor having subsequently attached the same goods, and not being able to procure payment of his debt, in consequence of the prior attachment; and the debtor being insolvent.[2]

§ 278. In a statutory proceeding in Massachusetts, taken by an attaching creditor, to avoid, as fraudulent, a previous attachment, an important question arose, in connection with the admissibility in evidence, on behalf of the first attacher, of the declarations of the defendant, made after the suit of the first attacher was brought, that his demand was *bonâ fide* and for a valuable consideration. Such declarations were held to be admissible, on the following grounds. "The party thus admitted [to contest the previous attachment] is in fact adversary in the suit to both plaintiff and defendant, for his interposition is bottomed upon a supposed confederacy between them to defraud him and other creditors, by a false claim and attachment, upon which the property is to be withdrawn from the attachment of *bonâ fide* creditors. In this state of the controversy, it would seem that the declarations or confessions of either of the parties against whom the fraud is alleged, ought not to be admitted to repel the charge. And yet it is obvious that a *bonâ fide* creditor who has made a just attach-

[1] Fairfield *v* Baldwin, 12 Pick. 388. [2] Adams *v.* Paige, 7 Pick. 542.

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ment may be injured, if, by reason of the admission of a third party into the suit, he is to be deprived of evidence which he would be entitled to, if no one had interposed between him and the debtor. There may be collusion between the debtor and the second attaching creditor to defraud the first, and this kind of fraud is quite as easy to be practised as the other. The debtor may deny the validity of the first cause of action, for the purpose of favoring the second attachment, and the first attaching creditor ought to be allowed the benefit of any acknowledgment made by the debtor, it being often difficult to furnish direct proof of the consideration of a note or other contract. . . . . Whatever the admission of the debtor may avail, the plaintiff is entitled to the benefit of. It probably will avail little against any evidence of fraud; but there seems to be no objection to its being weighed by the jury."[1] And it was afterward held, that such admissions, made after the subsequent attacher was admitted to defend the previous suit, were equally admissible in evidence for the first attacher.[2]

It is different, however, in regard to giving in evidence declarations of the first attaching creditor, in a proceeding taken by a subsequent attacher to defeat his attachment. There they are considered as entirely inadmissible.[3]

§ 279. In Massachusetts, the statute authorizing proceedings of this description, formerly provided that any subsequent attaching creditor of the same property which was attached by a prior attacher, might be admitted to defend the first suit, in like manner as the party sued could or might have done; and it was held, that in order to entitle a subsequent attacher to this privilege, it was not necessary that his suit should have been instituted in the same court as the first.[4] In a proceeding taken under that statute, the subsequent attacher offered to prove that a portion of the note on which the first suit was founded was not due to the plaintiff; but it was objected that the subsequent attacher could make no defence which the defendant could not himself make, and that the defendant could not make such a defence; but the court considered that position untenable.[5]

[1] Strong v. Wheeler, 5 Pick. 410.
[2] Lambert v. Craig, 12 Pick. 199.
[3] Carter v. Gregory, 8 Pick. 165.
[4] Lodge v. Lodge, 5 Mason, 407.
[5] Carter v. Gregory, 8 Pick. 165. The views of the court were thus expressed: "The

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§ 280. The difficulties attending the practical operation of the Massachusetts statute, authorizing a subsequent attacher to make *any defence* to a previous attachment, which the defendant might make, led to the substitution for it of another provision, to the effect that any person claiming title or interest in the attached property, might be allowed to dispute the validity and effect of the prior attachment, on the ground that the sum demanded therein was not justly due, or that it was not payable, when the action was commenced. Under this statute this case arose. A. made out and signed a note to B., without B.'s knowledge, and caused an attachment to be made thereon; which B. assented to and ratified afterwards, but not until a second attachment had been

object of the statute, under which this defence was made, is avowedly to prevent fraud in the attachment of real or personal estate; and the provisions of the statute are founded upon a supposed collusion between parties to the suit, to defraud creditors. To limit the defence which the subsequent attaching creditor is authorized to make, to such facts as the original defendant might himself aver, would be to impair in a great degree the use of the statute, as intended by the legislature. In cases of fraud and collusion, the defendant cannot avoid his contract by setting up fraud in defence against it. It is only when a contract is avoided by the statute, as in the case of usury or gaming, or when the consideration is illegal, that this can be done. Mere want of consideration, arising from a fraudulent bargain between the promisor and promisee, not in violation of any positive law, but for the purpose of defrauding others, cannot, we think, be shown in evidence by a party to the fraud, in defence of an action upon his contract. And it is such contracts that the legislature intended should be inquired into by third persons, whose rights are affected. The words 'in like manner,' in the statute, do not limit the defence, but only regulate the mode of making it. . . . . It is said, then, that the plaintiff is entitled to judgment, because he produces a note which the original defendant could not gainsay. If this be true, the statute is of no use; for its object is to admit others to a defence, which grows out of a collusive agreement between the plaintiff and the original defendant. Suppose the note to be fabricated for the sole purpose of abstracting the property of the promisor from his creditors, shall not this be shown? And yet the promisor himself could not show it. Or even suppose the note to be given for a valuable consideration, but that the sole purpose of the attachment was to defeat other creditors and to hold the property to the use of the debtor; shall not this be shown? And yet the promisor could not show it.

"But it is said, that if the legislature so intended, their act is without authority, because the plaintiff, as between himself and the debtor, is entitled to a judgment. The same may be said in all cases of default, or confessions of judgment; and the argument will go further, for after judgment the plaintiff is entitled to execution and the fruits of it; and yet, even at common law, a subsequently attaching creditor may defeat the first attachment, by showing that the judgment was collusively obtained.

"The statute has only provided a mode of preventing collusive judgments, instead of leaving the injured party to the relief before existing at common law; which was defective, because its final success depended upon the ability of the wrongdoer to respond in damages. The statute arrests the evil in the beginning, and rescues the property itself from the unlawful appropriation intended. Surely this was a just and proper subject of legislation; and the parties interested all have a hearing in court, and may maintain their several rights."

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made by C., who contested the validity of A.'s attachment, on the ground that the note sued on was not a debt due to B. at the time of the attachment. The court sustained this position, because — among other reasons — the note did not constitute an express promise until assented to by B.[1] But where a debt was due and payable when an attachment was taken out, and the attachment was contested by a subsequent attacher, on the ground that it was obtained by the order and direction of the defendant, and that the assent of the creditor was not given until after the subsequent attachment had been levied, the court held, that under the statute in question, the subsequent attacher had no right to make the question; because the facts did not show that the debt was not justly due and owing, or that it was not payable, when the suit was brought.[2]

§ 281. Whether if a debtor himself cause an attachment to issue, and to be executed on his property in favor of his creditor, without the knowledge of the latter, a subsequent attacher can take advantage of that fact to dissolve the attachment, does not seem to have been directly decided; but in Massachusetts a case very nearly of that description was presented, where a debtor, at the time when his debt was incurred, promised to secure his creditor in case of difficulty; but the manner in which this was to be done was not agreed upon; and the debtor afterward, being in failing circumstances, caused his own property to be attached on behalf of the creditor, but without his knowledge; and the creditor, before he was informed of the attachment, had said, that if the debtor did not secure him, he was a rascal. The court held, that the agreement to secure the creditor was tantamount to the creation of an agency in the debtor, which authorized him to cause the attachment; or, if not, that the attachment was ratified by the creditor; and in either case it was valid against subsequent attaching creditors.[3]

§ 282. There are other cases in which attachments will be held to be dissolved, by the acts of the plaintiff, as to subsequent attaching creditors. Each attacher has a right to the surplus of the defendant's property, after satisfying the previous attachments;

[1] Baird v. Williams, 19 Pick. 381. In Swift v. Crocker, 21 Pick. 241, the attachment was sued out and in part executed before the note was signed, and was dissolved by a subsequent attacher.

[2] Baird v. Williams, 19 Pick. 381.

[3] Bayley v. Bryant, 24 Pick. 198.

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and any act of an attaching creditor, after the institution of his suit, altering his writ, or changing or increasing the demand upon which he attached, is, in effect, a fraud upon the subsequent attachers, and is regarded as dissolving his attachment, so far as they are concerned.

On the first of these points, that is, an alteration of the writ, it has been held, that an attachment is dissolved as between creditors, by amending the writ, under leave of court, by striking out the name of one of two defendants, so that the action stands as against the other defendant only.[1] So, too, by changing the place to which the writ is made returnable.[2]

On the second point, that of changing or increasing the demand upon which the attachment was obtained, it has been decided, that the filing of a new count to the declaration, which does not appear by the record to be for the same cause of action as that originally sued on, will dissolve the attachment. A case of this description first came up in Massachusetts, upon the following facts. The first attacher's writ contained two counts, the first, upon a promissory note for $171.82, the second for $2,000, money had and received. While the action was pending, the plaintiff added three counts; the first for $322, the balance of an account annexed, in which the charges were principally for labor, articles sold and delivered, and money paid; the second, on a promissory note for $96; and the third, on a promissory note for $500. Upon this state of facts a controversy arose between this plaintiff and a subsequent attacher, each claiming the proceeds of the property attached. The court declared the first attachment dissolved, and used the following language: "We think that after an attachment, or holding to bail, the plaintiff cannot alter his writ to the injury of a subsequent attaching creditor, or of bail. The subsequently attaching creditor has a vested right to the excess beyond the amount of the judgment to be rendered upon the writ of the first attaching creditor, as it was when served. So, bail are not to be made liable for a greater sum than was included in the writ at the time when they entered into the bail-bond. It is said that the second count would cover the additional counts; but it cannot be ascertained from the record that it was intended to cover them."[3]

[1] Peck v. Sill, 3 Conn. 157.
[2] Burrows v. Stoddard, 3 Conn. 431; Starr v. Lyon, 5 Ibid. 538.
[3] Willis v. Crooker, 1 Pick. 204.

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The same court held the same views, in a subsequent case, where the declaration contained a count for money had and received, and a count for goods sold and delivered, and the plaintiff, in the progress of the suit, under a leave to amend, filed nine new counts, on notes, checks, and for money lent, &c. The court there say: "The claim or cause of action, for the security of which a creditor obtains his lien by attachment, should be clearly indicated in the writ and declaration. The declaration should set forth clearly the cause or causes of action to be secured by the attachment. And it would be a manifest injustice to a subsequently attaching creditor, to permit the prior attacher to amend, by the introduction of claims which were not originally set forth and relied upon in the declaration; for he has a vested interest in the surplus. The rights of the attaching creditors should be ascertained as they existed and were disclosed by the writ and declaration, at the time when they made their attachments. If it were otherwise, the attachment law might be made a most powerful engine of fraud, that would work up the whole of the debtor's property for the use of the first attacher, who should think proper to enlarge his claims sufficiently to embrace it."[1]

So, where a defendant in an attachment suffered default, and the plaintiff took judgment for the whole claim in suit, without deducting therefrom the amount of certain articles received by him from the defendant in part payment of the claim; it was held, that his attachment was thereby vacated as to subsequent attaching creditors.[2]

§ 283. In Maine, where the parties, during the pendency of a suit by attachment, made a settlement of all their accounts, by which a balance was found due to the plaintiff, for which judgment was entered in his favor by consent; and the settlement included some demands for which the writ contained no proper counts, and some which were not payable till after the action was commenced; it was held, that the attachment was dissolved *in toto*, as to subsequent attaching creditors.[3]

§ 284. A very strong case was where, by a slip of the pen, in

[1] Fairfield v. Baldwin, 12 Pick. 388.
[2] Pierce v. Partridge, 3 Metcalf, 44.
[3] Clark v. Foxcroft, 7 Maine, 348; Fairbanks v. Stanley, 18 Ibid. 296.

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making out the writ, the command to the officer was to attach to the value of *six dollars* only, while the cause of action set forth, and the judgment afterwards recovered, were for more than *four hundred* dollars. With the consent of the defendant, the writ was amended by inserting the word *hundred* after the word *six;* and yet it was decided, that a subsequent attacher was not affected by the amendment, and that he might maintain an action against the officer for applying the attached property in full satisfaction of the previous attachment; there not being sufficient to satisfy both.[1]

§ 285. But where an attorney, inadvertently, and without the knowledge of his client, took a judgment and obtained execution for a sum known by his client to be more than was really due him, and on discovering his mistake, went to the officer holding the execution, and stated the sum that was actually due the plaintiff, and that he had come to give instructions relative to the service of the execution; it was held, that, as there was no fraudulent intent, but a mere mistake, the attachment was not thereby dissolved.[2] And so, a mere amendment of the declaration, by which the amount to be recovered is not increased, and no new cause of action is introduced, will not vacate an attachment. If, for example, there are money counts only in the declaration, which refer to a bill of particulars annexed, containing a description of bills of exchange, notes, &c., which are to be offered in evidence; counts subsequently added, technically describing those bills, notes, &c., would not be considered as new causes of action, but as entirely consistent with the intent of the plaintiff, as originally manifested in his writ and declaration. If, however, such an intent cannot be inferred from the writ and declaration, the new counts will be considered to be for other, and not for the original, causes set forth.[3]

§ 286. But where a declaration contains the money counts, how is it to be determined what demands were put in suit, and

[1] Putnam *v.* Hall, 3 Pick. 445; Danielson *v.* Andrews, 1 Ibid. 156.

[2] Felton *v.* Wadsworth, 7 Cushing, 587. See in the opinion of the court the remarks upon the cases of Fairfield *v.* Baldwin, and Pierce *v.* Partridge. See, also, Laighton *v.* Lord, 9 Foster, 237.

[3] Fairfield *v.* Baldwin, 12 Pick. 388; Miller *v.* Clark, 8 Ibid. 412; Ball *v.* Claflin, 5 Ibid. 303; Laighton *v.* Lord, 9 Foster, 237; McCarn *v.* Rivers, 7 Iowa, 404; Austin *v.* Burlington, 34 Vermont, 506.

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what were afterwards introduced? The rule seems to be, that those which the plaintiff owned when the suit was brought, and which were due and payable, and liable to be introduced without amendments, and which were so introduced, and judgment obtained upon them, cannot, in the absence of contradictory proof, be regarded as not in suit: for instance, none of the cases decide that an attachment would be dissolved, by proving a promissory note under a money count originally contained in the declaration.[1]

§ 287. Though, as before stated, a mere amendment of a declaration, by which the amount to be recovered is not increased, and no new cause of action is introduced, will not dissolve an attachment, yet it has been held in Massachusetts, that the introduction of new defendants into the writ after the levy of it, will have that effect. Thus, where partnership property was attached, upon a writ containing the names of three only out of four partners, and the next day the name of the fourth was inserted, and a new attachment made upon the same property; but in the mean time another creditor had attached the property, upon a writ against the four partners; it was decided, that the first attachment was vacated as against the second attaching creditor.[2]

§ 288. Another act of a plaintiff by which, as to subsequent attachers, it is said his attachment will be dissolved, is the referring of the action, and *all demands between the plaintiff and defendant*, to arbitration; unless it be shown that the reference covered only the demands sued upon. The Supreme Court of Maine carried the doctrine a step further, and held, that it makes no difference whether any new demand beyond the original cause of action is introduced, or if introduced, whether it is allowed, or not. The mere act of referring, where the rule of reference is carried into effect, is considered to dissolve the attachment; on the principle, that, for the sake of a general settlement with his adversary, or for any other reason satisfactory to himself, the plaintiff consents to waive and does waive the security he holds under his attachment. And the court say, "Unless such a principle should be adhered to, a plaintiff's demand might be essentially increased, by the introduction of new causes of action, and

[1] Fairbanks v. Stanley, 18 Maine. 296. [2] Denny v Ward, 3 Pick. 199.

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in this manner a second attaching creditor might lose the benefit of his attachment, and though with no immoral motive on the part of the plaintiff, such second creditor would be, in legal contemplation, defrauded of his rights."[1]

The better rule, however, seems to be that adopted in Massachusetts, where, though it was at first held, that the mere fact of entering into such a reference dissolves the attachment,[2] in a subsequent case that decision was limited, and it was determined that, if it be shown that no new demand was admitted by the referees, the attachment will not be dissolved.[3]

§ 289. Fraudulent attachments will also be overturned, when brought in conflict with the rights of third persons, other than attaching creditors. Thus, where A., being desirous of purchasing certain mortgaged land, paid the mortgagee the value of his interest therein, and the mortgagee reconveyed to the mortgagor, to enable him to give a deed of the whole estate to A., but immediately afterwards, and before the deed to A. was executed, attached the land in a suit against the mortgagor, the attachment was declared fraudulent and void as against A.[4]

A case involving similar principles, came up in Vermont, under a petition to foreclose a mortgage. A. and B. were creditors of C., who had engaged to give A. security for his debt by a mortgage on lands. On a certain day, finding himself in failing circumstances, C. applied to B. and stated to him his pledge to A., and requested B. to prepare a note and a mortgage to A. to secure the payment of the note; at the same time disclosing to B. his situation, and pointing out to him property to a large amount, which he requested B. to attach for his own security. To this arrangement B. made no objection, and C. executed the note and mortgage and took them away, and the mortgage was lodged for record early the next morning. In the mean time, B. sued out attachments against C., and attached the premises embraced in the mortgage, together with the other property designated by C. The controversy was between A., claiming the property under the mortgage, and B., claiming it under the attachment. It was held, that the attempt by B. to defeat the arrangement he had previously

[1] Clark v Foxcroft, 7 Maine, 348. See Mooney v. Kavanaugh, 4 Maine, 277.
[2] Hill v. Hunnewell, 1 Pick. 192.
[3] Seeley v. Brown, 14 Pick. 177.
[4] Spear v. Hubbard, 4 Pick. 143.

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acquiesced in, was inconsistent with good faith, and surreptitious, and that the mortgage should be preferred to the attachment.[1]

In New Hampshire, a similar case arose, on this state of facts. A. had mortgaged certain real estate, apparently for its full value. B. and C. being both creditors of A., B. informs C. that he proposes to procure an arrangement by which that mortgage shall be removed, and one taken to himself, and C. advises him to effect the arrangement, which is at once proceeded with. Before the necessary writings are prepared, and while they are in progress, C. causes an attachment to be made of the land; which does not become known to B. and the other parties, until their agreement was completed and the deeds recorded. B. then filed his bill in equity, setting forth the facts, and praying that C. might be enjoined against claiming anything in the land contrary to the title of the plaintiff under the mortgage, and that the attachment might be postponed to the mortgage. The court, considering the attachment under such circumstances to operate as a direct fraud upon B., granted the decree according to the prayer of the bill.[2]

So, where a conveyance had been made of certain lands, on the 7th of May, and before it could be properly recorded, one attached the lands to secure a note signed by the grantors on the 8th of May, and payable in thirty days, but which was antedated, as the 3d of April preceding, being the time when the goods which formed the consideration of it had been sold on a credit of six months; it was held, that the antedating the note, and creating a present debt, on which the attachment of the lands was made, was a fraud on the grantees, and did not disturb their rights under the conveyance, whatever might be the validity of the proceedings as between the parties.[3]

[1] Temple *v.* Hooker, 6 Vermont, 240.
[2] Buswell *v.* Davis, 10 New Hamp. 413.
[3] Briggs *v.* French, 2 Sumner, 251.

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CHAPTER XII.

CUSTODY OF ATTACHED PROPERTY.

§ 290. THE writ of attachment, in its action upon tangible property, has no value or efficacy, except as a means of keeping the property until, under the final process in the cause, it can, by a sale, be made available to satisfy the plaintiff's demand. Hence, the first duty of the attaching officer is to retain possession of the property. If he waste or lose it, or suffer it to be diverted to some other purpose, or to go out of his possession, except in due course of law, he is liable for it to the plaintiff, if he obtain judgment and execution in the attachment suit, or to the defendant, if that suit fails.[1]

It is, therefore, indispensably necessary that the officer should sustain such a relation to personal property which he has seized, as will enable him to hold it to answer the purpose for which it was attached. To this end, he is, by the levy of the attachment, and the reduction of the property into his possession, vested with a special property in the latter, which enables him to protect the rights he has acquired;[2] and this property constitutes an insurable interest, which he may protect by obtaining insurance thereon, though he is not under obligation to do so.[3]

[1] Sanford *v.* Boring, 12 California, 539; Post, § 423.

[2] Barker *v.* Miller, 6 Johns. 195; Hotchkiss *v.* M'Vickar, 12 Ibid. 403; Wilbranam *v.* Snow, 2 Saunders, 47; Ladd *v.* North, 2 Mass. 514; Gibbs *v.* Chase, 10 Ibid. 125; Whittier *v.* Smith, 11 Ibid. 211; Poole *v.* Symonds, 1 New Hamp. 289; Huntington *v.* Blaisdell, 2 Ibid. 317; Odiorne *v.* Colley, Ibid. 66; Lathrop *v.* Blake, 3 Foster, 46; Nichols *v.* Valentine, 36 Maine, 322; Stiles *v.* Davis, 1 Black, 101. A condensed summary of the rules concerning the relation of an officer to personal property he has attached, is thus given by ISHAM, J., in Braley *v.* French, 28 Vermont, 546: "In the attachment of personal estate, the officer acquires a special property, and the right to its custody and possession. For any injury to it, the right of action is in the officer, as, in any termination of the case, he is accountable for the property either to the creditor or debtor. That special property the officer may release, so as to destroy any lien upon the property created by the attachment. He may permit the possession of the property to remain with the debtor, in which case it can be held by a subsequent attachment, or a subsequent purchaser, free from any lien or claim of the officer upon it. His right over the property is independent of the creditor or debtor, as, in a given event, he is responsible for it to the debtor, and in another event to the creditor; and that right exists so long as that special property continues in him

[3] White *v.* Madison, 26 Howard Pract. R. 481.

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This special property of the officer continues so long as he remains liable for the attached effects, either to have them forthcoming to satisfy the plaintiff's demand, or to return them to the owner, upon the attachment being dissolved; but no longer.[1] For any violation of his possession, while his liability for the property continues, he may maintain trover,[2] trespass,[3] or replevin.[4] And he alone can maintain any such action; it cannot be maintained by the attachment plaintiff.[5] If he die before action brought in his favor against a trespasser, his administrator may maintain trover, for the benefit of the attaching creditor.[6] And if the conversion take place while the officer who attached the property remained in office, his subsequent resignation of his office will not deprive him of his right of action.[7] In order to maintain his special property, and to entitle himself to the continued protection of the law, the officer must, in his proceedings with the property subsequent to the attachment, comply with all the requirements of the law, or show some legal excuse for not doing so; and if he does not, he becomes liable, not only to those on whose behalf he acts, but also to the owner of the property, and those claiming under him and standing in his situation.[8] Thus, if he sells the property without lawful authority, he is counted a trespasser *ab initio;* and the pendency of the action in which the attachment was made is no obstacle to an immediate suit by the owner.[9]

§ 291. Nothing is more important in sustaining the officer's special property in articles attached, than his continued possession of them, actual or constructive. This point, regarded in reference to the protection of attached property from other attachments, and the continuation of the officer's lien, falls properly under another division of this work.[10] But, considered with a view to the rendi-

[1] Collins *v.* Smith, 16 Vermont, 9; Gates *v.* Gates, 15 Mass. 310.

[2] Ludden *v.* Leavitt, 9 Mass. 104; Badlam *v.* Tucker, 1 Pick. 389; Lowry *v.* Walker, 5 Vermont, 181; Lathrop *v.* Blake, 3 Foster, 46.

[3] Brownell *v.* Manchester, 1 Pick. 232; Badlam *v.* Tucker, Ibid. 389; Walker *v.* Foxcroft, 2 Maine, 270; Strout *v.* Bradbury, 5 Ibid. 313; Whitney *v.* Ladd, 10 Vermont, 165.

[4] Perley *v.* Foster, 9 Mass. 112; Gordon *v.* Jenney, 16 Ibid. 465

[5] Skinner *v.* Stuart, 39 Barbour, 206.

[6] Hall *v.* Walbridge, 2 Aikens, 215.

[7] Polley *v.* Lenox Iron Works, 4 Allen, 329.

[8] Jordan *v.* Gallup, 16 Conn. 536.

[9] Ross *v.* Philbrick, 39 Maine, 29.

[10] See Chap. XVI. on Dissolution of Attachment.

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tion of the property, at the termination of the suit, to meet the exigency of the execution, should one be obtained, or to be returned to the defendant, should judgment be given in his favor, or the attachment be otherwise dissolved, a class of questions arise, which we now proceed to consider.

§ 292. And, first, to what degree of care and diligence in the keeping of attached property is an officer held? This question received a careful and elaborate consideration by the Supreme Court of Vermont, which is referred to here, rather than in another place, because it was raised in connection with the officer's liability to the plaintiff in attachment, for not having property forthcoming on execution. Certain cattle were attached, and the officer being sued for failing to have them forthcoming, to be sold on execution, offered testimony to show that when they were attached, he delivered them, for safe keeping, to one A.; that the plaintiff's agent, who ordered the attachment made, was present and made no objection; that A. put the cattle into a pasture, with a good and sufficient fence; and, in a few days after, the defendant, the owner of the cattle, without the knowledge or consent of the officer, or of A., took down the fence of the pasture, drove the cattle out, and put them in his own pasture, and gave such notice that other creditors attached and held the cattle. This testimony was rejected by the court, and the matter came up on the propriety of the rejection. The Supreme Court, after examining a number of cases cited in support of the plaintiff's action,[1] proceed as follows: —

"Thus stand the decided cases which have been presented to the court. And it is needless to say they do not afford much aid in determining the question before us. We are left to decide it, much as we judge the general principles of the law of bailment and the kindred analogies require.

"So far as the general principles of the law of bailment are concerned, there is not at the present day, perhaps, any very striking reason to be urged why sheriffs should be laid under any higher degree of obligation in regard to keeping property, than other bailees for pay, i. e. ordinary care and diligence. But early

[1] Those cases were, Jenner v. Joliffe, 6 Johns. 9, and 9 Johns. 381; Cilley v. Jenness, 2 New Hamp. 87; Phillips v. Bridge, 11 Mass. 242; Tyler v. Ulmer, 12 Ibid 163; Congdon v. Cooper, 15 Ibid. 10; and Runlett v. Bell, 5 New Hamp. 433.

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in the history of the common law it was decided that, in regard to property taken on final process (and in England it is taken on no other ordinary process), the officer making the levy should be liable for its safe keeping and forthcoming, in all cases, unless hindered by public force, or inevitable accident, and that he could not excuse himself by showing a rescue even.[1] The same rule of liability obtains in regard to the body, when once in custody upon execution.[2] But when the body is arrested on *mesne* process, the sheriff may return a rescue.[3] The reason assigned in the books is, that, in the case of arrest and custody on final process, the officer has usually more time for preparation, and may, if he will, have the aid of the *posse* of the county; but in the case of *mesne* process, he must arrest when the debtor is pointed out to him, and may be often required to do it suddenly, and cannot always be supposed to have the *posse* at his command, at a moment's warning. To my mind, the attempt at making a distinction in the cases, shows more reason for dispensing altogether with any such rigorous requirement, in either case, than it does for so wide a distinction between the two cases; but such is the law, and so are the reasons upon which its sages have seen fit to erect distinctions.

"The only question now is, whether we shall adopt the analogy of this distinction in regard to property. The court are disposed to do it, for two reasons: 1. If we hold the sheriff and other officers liable, in the case of property attached on *mesne* process, only for ordinary care and diligence, such as other bailees for pay are required to exercise, we place the liability upon a reasonable basis; whereas the rigorous accountability imposed upon certain classes of bailees, on account of some supposed facility or temptation which they have been said to possess for collusive rescues or robberies, is not founded upon any just warrant, either of sound judgment or constant experience. I refer to the cases of common carriers, and sheriffs, in regard to property taken on final process. 2. We think there is far more reason for the distinction which we here make, in regard to the liability of sheriffs for the keeping of goods on *mesne* and final process, in analogy to their different liability for keeping the body when arrested on those different processes, than there is for the distinction made in this latter case.

[1] Mildmay *v.* Smith, 2 Saund. 343, n. 3; Clerk *v.* Withers, 2 Ld. Raym. 1075.
[2] 12 Mod. 10; O'Neil *v.* Marson, 5 Burrow, 2812; 2 Saund. 244, note a.
[3] Cases cited above, and note to 2 Saund. 345.

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For when property is taken on final process, it is to be kept but a short time, at longest, so that it may be closely watched, and kept with this severe diligence for a few days, without materially interfering with the other duties of the sheriff. But in the attachment of property on *mesne* process, in matters of collection, there will ordinarily be a delay of from six to eighteen months, and in matters of controversy this delay will be extended to many years; and to require the sheriffs to keep all property, by them attached on *mesne* process, at all hazards, except inevitable accident, or public force, would, of course, justify an expense in proportion to the degree of responsibility required, and would thus, in many cases, defeat the object of the attachment, by consuming the property in needless expense. We think, then, there is very good reason why the officer attaching property on *mesne* process, should only be liable to the same extent as bailees for hire. If he return the attachment, he is, *primâ facie*, liable to produce the property on execution, but as we think, may excuse himself by showing that it is not in his power, and that he has been guilty of no fault."[1]

[1] Bridges *v.* Perry, 14 Vermont, 262; Smith *v.* Church, 27 Ibid. 168. In Briggs *v.* Taylor, 28 Vermont, 180, this subject came again before the same court, when REDFIELD, C. J., presented the following views: "As a new trial becomes necessary, it will be of some importance to inquire in regard to the proper mode of defining the duty of the officer in keeping goods attached on *mesne* process. It is usually defined in practice, in this State, certainly so far as we know, much as it was in this case, by the use of the terms 'ordinary and common care, diligence, and prudence.' And it is probable enough, these terms might not always mislead a jury. But it seems to us, they are somewhat calculated to do so. If the object be to express the medium of care and prudence among men, it is certain these terms do not signify a fixed quality of mediocrity even. For if so, they would not be susceptible of the degrees of comparison, as more ordinary and most ordinary, which medium, and middle, and mean, are not. The truth is, that ordinary and middling and mediocrity even, when applied to character, do import to the mass of men, certainly, a very subordinate quality or degree; something quite below that which we desire in an agent or servant, and which we have the right to require in a public servant, especially. A man who is said to be middling careful, or ordinarily careful, is understood to be careless, and is sure never to be trusted. . . . . The court, in Bridges *v.* Perry, as will be obvious from a careful examination, had no purpose of excusing this class of officers from any degree of care and diligence, which careful men would expect under the circumstances. And this, it seems to us, is the true measure of liability, in all cases of bailment. The bailee is bound to that degree of diligence, which the manner and nature of his employment make it reasonable to expect of him; anything less than this is culpable in him, and renders him liable. The conduct of men in general in the region where the attachment is made, may be some guide to what ought to be required of the defendant in keeping property attached. We mean, of course, prudent and careful men; for no one is expected to go very essentially beyond the common custom of the country in such matters, as it must be attended with extraordinary expense, and a question might thereby arise as to the propriety of incurring such expense." See Moore *v.* Westervelt, I Bosworth, 357.

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The same doctrine was held by the Superior Court of New Hampshire.[1]

§ 293. As previously stated, the officer must comply with all the requirements of the law, or show some legal excuse for not doing so. We will, therefore, endeavor to ascertain what will, and what will not, excuse an officer, for not having attached property forthcoming on the plaintiff's execution.

§ 294. *Of sufficient Excuse.* There can be no doubt that an officer may excuse his failure to have property in hand to answer the execution, by showing that, though attached as the property of the defendant, it was, in fact, not his. Whether, if this fact was known to him when he levied the attachment, and he, notwithstanding, made the levy, and returned the property as attached, he could afterwards excuse himself on that ground, is questionable;[2] but where, at the time of the levy, he believes the property to be the defendant's, and takes it as such, and it turns out afterwards that it was not, and he fails to have it ready to meet the execution, he can certainly escape liability by proving the fact to have been so.[3] So, if an officer attach property of the defendant, which is by law exempt from attachment, he cannot be held responsible for its non-delivery on execution, unless it was attached with the consent of the defendant.[4] So, if he attach property which is *in custodia legis*, and therefore not attachable, he is not liable for failing to have it forthcoming on execution.[5] And if attached property, of which due care is taken by the officer, be lost by fire or theft, the officer is not liable for the loss: otherwise, however, if it be burned or stolen while he omits due care to prevent such loss.[6]

§ 295. *Of insufficient Excuse.* An officer cannot protect him-

[1] Kendall *v.* Morse, 43 New Hamp. 553.
[2] French *v.* Stanley, 21 Maine, 512.
[3] Fuller *v.* Holden, 4 Mass. 498; Tyler *v.* Ulmer, 12 Ibid. 163; Denny *v.* Willard, 11 Pick. 519; Canada *v.* Southwick, 16 Ibid. 556; Dewey *v.* Field, 4 Metcalf, 381; Jordan *v.* Gallup, 16 Conn. 536; Cilley *v.* Jenness, 2 New Hamp. 87; French *v.* Stanley, 21 Maine, 512; Chapman *v.* Smith, 16 Howard Sup. Ct. 114; Magne *v.* Seymour, 5 Wendell, 309; Mason *v.* Watts, 7 Alabama, 703.
[4] Cilley *v.* Jenness, 2 New Hamp. 87.
[5] Hale *v.* Duncan, Brayton, 132; Ante, § 251.
[6] Dorman *v.* Kane, 5 Allen, 38; Starr *v.* Moore, 3 McLean, 354.

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self from his obligation to have the property forthcoming on execution, by making return that he attached it "*at the risk of the plaintiff.*" Such a return could not affect the rights of the creditor, or relieve the officer from any portion of his responsibility.[1] Nor can he contest the validity of the judgment against the defendant in the action in which he attached the property, for the purpose of relieving himself from responsibility for the property.[2]

§ 296. If an officer attach property under an informal writ, and afterwards the writ is altered and made to assume a legal form, and the plaintiff obtain judgment upon it, the subsequent alteration will not excuse the officer from keeping the property safely, that it may be applied to satisfy the plaintiff's judgment, or re turned to the defendant, if he should become entitled to it.[3]

§ 297. The removal of attached property out of an officer's precinct, without his consent, does not prevent him from pursuing and reclaiming it anywhere, even though removed into another State;[4] nor does it excuse his failure to have it forthcoming on execution. Therefore, where, in an action against an officer for such a failure, the property consisted of a quantity of logs, and he offered to prove that the logs were afloat in a body, with a boom around them, on their way from one point to another, and that the current of the water and the power of the wind were so great, that the officer, with any force he could command, could not stop the logs in his precinct, and that the parties in possession of them were able to resist, and did successfully resist, his taking or holding possession of the logs, until they had arrived in another county; it was held, that the evidence was rightly rejected; the facts, if true, constituting no defence.[5] Nor will he be excused because the property was taken from him by a trespasser.[6]

§ 297 *a*. But if the officer act under statutory provisions which dispense with his actual custody of the attached property, and, while the property is out of his actual custody, it be wrongfully

[1] Lovejoy *v.* Hutchins, 23 Maine, 272.
[2] West *v.* Meserve, 17 New Hamp. 432.
[3] Childs *v.* Ham, 23 Maine, 74.
[4] Utley *v.* Smith, 7 Vermont, 154; Rhoads *v.* Woods, 41 Barbour, 471.
[5] Lovejoy *v.* Hutchins, 23 Maine, 272.
[6] Lovell *v.* Sabin, 15 New Hamp. 29.

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taken away and sold by the defendant, he cannot be held responsible for not producing it on execution. This was decided in Massachusetts, under a statute in these words: "When an attachment is made of any articles of personal estate, which by reason of their bulk, or other cause, cannot be immediately removed, a copy of the writ and of the return of the attachment may, at any time within three days thereafter, be deposited in the office of the clerk of the town in which it is made, and such attachment shall be equally valid and effectual, as if the articles had been retained in the possession and custody of the officer." The officer attached property which, by reason of its nature and bulk, could not be easily removed, and the defendant, without his knowledge or consent, removed and sold it. There was no proof of negligence or official misconduct on the part of the officer, or that the loss of the property could have been prevented by any care on his part, without retaining the possession. The court said: "The language of the statute is this: 'Such attachment shall be equally valid and effectual, as if the articles had been retained in the possession and custody of the officer.' We think it follows clearly that property thus attached, although a lien is created upon it for the benefit of the creditor, is not to be regarded as in the possession and custody of the officer, and that no such responsibility devolves upon him as if it were. . . . . We do not mean to imply that the officer might not be responsible for any neglect or misconduct in relation to the property. If there were any collusion with the debtor, wrongful omission to make the attachment known to him, or neglect of interfering to protect the property, when, by a change of circumstances, its removal and reduction into the officer's possession became proper or necessary, the rule might be different. We only decide that the officer is not responsible as if the goods were in his actual custody." [1]

§ 298. The capture by a hostile force of that part of an officer's precinct in which he had attached property, will not excuse him from producing the same on execution, unless the common consequences of a capture, according to the laws of war, should follow; such as restraint upon the persons of the inhabitants captured, which would prevent their removal, and upon their effects, so that they could not be withdrawn from the control of

[1] Hubbell v. Root, 2 Allen, 185.

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the captors. If the capture is not attended with these effects, there is no reason why the obligation of any citizen, created before the capture, should be destroyed or impaired.[1]

§ 299. The removal of an officer from office, between the time of levying the attachment and that of the issue of execution, will not excuse his failure to produce the property to meet the execution; for his special property remains, to secure the plaintiff in the fruits of his judgment.[2] Nor can he escape liability for such failure, because the execution was delivered to another officer, instead of to him.[3] Nor will he be relieved from his liability for a failure of his deputy to produce attached property to answer the execution, by reason that such failure took place after the latter had ceased to be his deputy.[4]

§ 299 *a*. In connection with the matter of the obligation of an attaching officer to have attached property forthcoming to satisfy the execution, the question arose in New York, as to whom the execution should be directed, where the attaching officer had gone out of office between the time of the attachment and that of the issue of the execution. In the case in which the question arose, the execution was an ordinary *fieri facias*, directed to the sheriff of the county, and delivered to the successor in office of him who made the attachment. He demanded the attached property of his predecessor, who failed to deliver it, and the plaintiff in the attachment sued him for this failure. There was no statutory provision directly applicable to such a case, and the Supreme Court of New York considered the question on principle, and by analogy, and came to the conclusion that "the plaintiff was *ahead of his time* in demanding the attached property before he had issued a proper execution"; which would have been a special one against the attached property, and should have been delivered to the person who, as sheriff, had levied the attachment; and not having been delivered to him, he could not be made liable for failing to deliver the property to his successor.[5]

§ 300. It is no excuse for failing to have property forthcoming,

[1] Congdon *v.* Cooper, 15 Mass. 10.
[2] Tukey *v.* Smith, 18 Maine, 125; McKay *v.* Harrower, 27 Barbour, 463.
[3] Lovell *v.* Savin, 15 New Hamp. 29.
[4] Morse *v.* Betton, 2 New Hamp. 184. [5] McKay *v.* Harrower, 27 Barbour, 463.

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that it was of a perishable nature, and was, therefore, suffered to remain in the defendant's possession. The officer's duty is, whenever its further detention would expose it to ruin, and thus defeat the object of the attachment, to expose it fairly to public sale, and account for only the net proceeds.[1]

The disposition of attached property, which is perishable in its nature, or the keeping of which would be attended with great expense, is, to a considerable extent, now regulated by statutory provisions, and not left to the discretion of the officer. The court in which the suit is pending is, in many States, authorized to order a sale during the pendency of the suit. In such a case it was held by the Supreme Court of Missouri, that the power confided to the court was for the benefit of both parties, debtor as well as creditor, the object of the sale being merely to change the form of the property; and that the plaintiff had no right, as in the case of an execution, to order the officer to stop the sale; and, if the officer should neglect to sell as ordered, his responsibility would depend, as in similar cases of disobedience to the proper mandates of the court, upon the validity of the excuse he may offer, and the mere order of the plaintiff would constitute none whatever.[2]

§ 301. An officer attached a pleasure carriage and several wagons and sleds, which he left in open fields, where they were allowed to remain several months exposed to the weather. He was sued for neglect in preserving and taking care of the property. At the trial the plaintiff insisted, as a matter of law, that, as the officer had permitted the property to remain exposed to the weather and unprotected, whereby it had suffered damage and become reduced in value, it constituted such a neglect of duty on the part of the officer as would render him liable. But the court left the question to the jury, to find whether the officer exercised ordinary care and prudence in the custody and preservation of the property attached, and instructed the jury that it was the duty of an officer attaching property to use ordinary care and prudence in the custody and preservation of the property, and that ordinary care and prudence was such as men of ordinary care and prudence usually exercise over their own property; and that it was for the jury to say whether it was common or ordinary care and prudence to keep such property as the carriage, wagons, and sleds in ques-

[1] Cilley *v.* Jenness, 2 New Hamp. 87. [2] Oeters *v.* Aehle, 31 Missouri, 380.

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tion in the manner in which they were kept. This ruling of the court was held by the Supreme Court of Vermont to be erroneous. Said the court, "We do not think a judge is ever bound to submit to a jury questions of fact, resulting uniformly and inevitably from the course of nature, as that such carriages will be injured, more or less, by exposure to the weather during the whole winter; or that a judge is bound to submit to a jury the propriety of such a course, when it is perfectly notorious that all prudent men conduct their own affairs differently. This uniformity of the course of nature or the conduct of business, becomes a rule of law. But while there is any uncertainty, it remains matter of fact, for the consideration of a jury. It could not be claimed that it should be submitted to a jury whether cattle should be fed or allowed to drink, or cows be milked." [1]

§ 302. The expense attending the keeping of attached property, is no excuse for failing to produce it on execution. Therefore, where an officer had attached certain cattle, and did not have them forthcoming under the execution, and he was sued for his failure in this respect, it was held, that he could not show, either in bar of the action or in mitigation of damages, that the country was, at the time of the attachment, in an impoverished state as to fodder for cattle, and that had he taken the cattle into possession, and kept them for the execution, the expense would have exceeded the value; and that, in fact, they could not have been kept alive.[2]

§ 303. Where an officer is instructed by the plaintiff's attorney to deliver attached property to a certain person, and take his receipt therefor, and he does so, he cannot be held to produce the property on execution.[3]

§ 304. In an action against an officer for failing to keep attached property, so as to have it on execution, he cannot be permitted to impeach the plaintiff's judgment, except, perhaps, on the ground of fraud.[4] Nor can he take advantage of the loss of the writ of attachment; the fact of the existence of which may

[1] Briggs v. Taylor, 28 Vermont, 180.
[2] Tyler v. Ulmer, 12 Mass. 163; Sewall v. Mattoon, 9 Ibid. 535.
[3] Rice v. Wilkins, 21 Maine, 558.
[4] Adams v. Balch, 5 Maine, 188.

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be proved by parol.[1] He may, however, show, in mitigation of damages, that the execution has, since suit brought against him, been satisfied; but the plaintiff will, nevertheless, be entitled to recover nominal damages and costs.[2]

§ 305. In order to fix the officer's liability for attached property, it is necessary that a demand should be made of him upon the execution. If the execution be placed in the hands of the officer who made the attachment, he being still in office, that will be sufficient notice to him, that the plaintiff claims to have the attached goods applied to satisfy the execution.[3] Where no place is prescribed by law, at which a demand must be made, it may be at his place of abode, or wherever he may be. If the demand should be made of him at a place where the property is not, and he offers to deliver it to the officer at the place where it is, it will be the duty of the officer to repair to such place to receive it; but if he refuse to deliver it at any place, this refusal will subject him to an action, whether the property was at the place where demanded, or not.[4] If the property attached has been sold before judgment and execution, by consent of the parties, or under statutory authority, the officer is bound to keep the proceeds of the sale in his hands to answer the execution, and the delivery of the execution to him authorizes him to apply the money in his hands to its satisfaction.[5]

§ 306. When an attachment has been dissolved, by reason of a judgment in favor of the defendant, or otherwise, the special property of the officer in the effects attached is at an end, and he is bound to restore them to the defendant; and if he fail to do so, he will be liable therefor. He cannot screen himself from this liability, by delivering the property to the plaintiff. It is not his duty — indeed it would be contrary to his duty — to make such a delivery to the creditor, even after his demand is ascertained and sanctioned by a judgment. Goods attached are in the legal custody of the officer, and he is accountable for them, no less to the defendant than to the plaintiff in the attachment; and the general property in the goods is not changed, until a levy and

[1] Brown v. Richmond, 27 Vermont, 583.
[2] Brown v. Richmond, 27 Vermont, 583.
[3] Humphreys v. Cobb, 22 Maine, 380.
[4] Scott v. Crane, 1 Conn. 255.
[5] Eastman v. Eveleth, 4 Metcalf, 137.

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sale by execution.[1] But in order to entitle the defendant to a return of the property, the attachment must be, in fact, dissolved. It is not enough that the defendant has settled with the plaintiff the matter in controversy, and is entitled, as against the plaintiff, to a return of the property. The fact of such settlement must be brought home to the officer, by actual notice, or by a discontinuance of the suit, before the defendant can maintain an action against him for the property.[2]

§ 307. After the dissolution of an attachment, the officer is responsible to the defendant for the attached property; but while the attachment is pending, can the defendant maintain an action against him for damage done to the property through his negligence? In Maine, it was decided that he cannot, because during the pendency of the attachment the officer is liable to the plaintiff therein, whose claim is paramount to that of the defendant, until the attachment is dissolved; and that a right of action does not accrue to the defendant until he is entitled to a return of the property, when he will have a full claim to indemnity.[3] In Vermont, however, the opposite ground was taken, so far as to allow the attachment defendant to sue the officer in such case, pending the attachment, but it was intimated that the attachment plaintiff might show his interest in the recovery, and that the court would thereupon order a stay of execution till the creditor's rights were determined, or might require the money to be paid into court to be held for the benefit of the creditor, if he should finally recover.[4]

In an action by the attachment defendant against the officer, for having lost or wasted a portion of the property, the latter may excuse himself from liability, by showing that he had applied the amount to the defendant's use, by paying with it the expenses of keeping the property,[5] or by satisfying with it other executions against the defendant.[6]

§ 308. But the liability of the officer to the defendant, for the attached property, does not necessarily accrue, in all cases, immediately upon the dissolution of the attachment; but must

[1] Blake v Shaw, 7 Mass. 505. See Snead v. Wegman, 27 Missouri, 176.
[2] Livingston v. Smith, 5 Peters, 90.
[3] Bailey v. Hall, 16 Maine, 408.
[4] Briggs v. Taylor, 35 Vermont, 57.
[5] Twombly v. Hunnewell, 2 Maine, 221. [6] Bennett v. Brown, 31 Barbour, 158.

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depend, as to the time when it accrues, upon the particular circumstances of the case. Thus, where property was delivered by the officer to a receipter, approved by the defendant, and the receipter failed to deliver it when required, it was held, that the defendant could not maintain an action against the officer therefor, until the lapse of a reasonable time to enable the latter to recover it from the receipter.[1]

§ 309. Where an officer fails to keep attached property to answer the execution, there is no reason why he should be subjected to a different rule of damages from that which prevails in actions generally, against officers for neglect or failure of duty; that is, the actual injury sustained by the plaintiff by reason of the neglect or failure. The value of the property attached, if less than the amount of the plaintiff's judgment, or the amount of the latter, where the value of the property is greater, will generally be *primâ facie* the measure of damages, subject to be mitigated by evidence produced by the officer.[2] Therefore, where a number of successive attachments were laid on property; and all the plaintiffs, except him whose writ was last levied, believing that the property would lessen in value, and that the proper season for selling it would be lost, if it should be kept until final judgment could be obtained, directed the officer to sell it, and hold the proceeds to satisfy the judgments to be recovered, in the order of their respective attachments; and the defendant assented to the sale, which took place; and a greater sum was produced than would have been, if the property had been kept and sold upon execution, but not sufficient to satisfy all the attachments, and the last attacher got nothing, and brought suit against the officer; it was held, that, though he had departed from the line of official duty, and the plaintiff was, therefore, entitled to recover damages, yet, as the plaintiff would have got nothing if the officer had performed his duty, nominal damages only could be recovered.[3] But an officer is not entitled to have a reduction made from the full value of the property, in mitigation of damages, for the expenses which *might* have attended the keeping, had it been kept safely.[4]

[1] Bissell *v.* Huntington, 2 New Hamp. 142.
[2] Sedgwick on Damages, 539–543.
[3] Rich *v.* Bell, 16 Mass. 294.
[4] Lovejoy *v.* Hutchins, 23 Maine, 272; Tyler *v.* Ulmer, 12 Mass. 163; Sewall *v.* Mattoon, 9 Ibid. 535.

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§ 310. If an officer state in his return the value of property attached, we have seen that he is *primâ facie* bound by it, and the burden is on him to show that the valuation was incorrect.[1] When sued for not having the property forthcoming on execution, if there be no other evidence of value than that furnished by the return, the officer will be concluded by it;[2] and so, it seems, if it should appear that the plaintiff relied upon the return, and was thereby led to abstain from efforts to get further security.[3]

§ 311. As to the matter of expenses attending the keeping of attached property, there can be no doubt that the general principle is, that where an officer is required to perform a duty involving disbursements of money out of his pocket, he must be reimbursed. When personal property is attached, it is to be kept by the officer at the expense of the defendant. If the defendant be unwilling to incur this expense, he must replevy it, or procure it to be receipted. If the officer afterwards receives an execution, he sells the property, and takes his pay for the expense of keeping, out of the money so received, and applies the remainder on the execution.[4] Thus the defendant pays for the keeping. If the defendant settles the debt with the plaintiff, so that no execution comes into the officer's hands, on which to make a sale, the officer may sustain an action against the defendant for the keeping.[5] If the property be sold by the officer, and thereafter the defendant satisfy the attachments, that will not deprive the officer of the right of retaining the expense of keeping out of the money in his hands.[6] If there should be a judgment for the defendant, or the suit be dismissed, the plaintiff will be liable for the expenses;[7] but the officer has no such lien on the property as will enable him, under such circumstances, to hold it for the payment thereof.[8] It was held in Vermont, that if the officer use the property — as, for instance, a horse — sufficiently to pay for its keeping, he cannot make the plaintiff pay for such keeping.[9]

[1] Ante, § 206.
[2] French *v.* Stanley, 21 Maine, 512.
[3] Allen *v.* Doyle, 33 Maine, 420.
[4] Hanness *v.* Smith, 1 Zabriskié, 495; Dean *v.* Bailey, 12 Vermont, 142; McNeil *v.* Bean, 32 Ibid. 429.
[5] Dean *v.* Bailey, 12 Vermont, 142; Sewall *v.* Mattoon, 9 Mass. 535.
[6] Gleason *v.* Briggs, 28 Vermont, 135.
[7] Phelps *v.* Campbell, 1 Pick. 59; Tarbell *v.* Dickinson, 3 Cushing, 345.
[8] Felker *v.* Emerson, 17 Vermont, 101.
[9] Dean *v.* Bailey, 12 Vermont, 142.

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CHAPTER XIII.

BAIL AND DELIVERY BONDS.

§ 312. I. *Bail-Bonds.* In many of the States, provisions exist for the dissolution of an attachment, upon the defendant giving bond, with approved security, for the payment of such judgment as may be recovered in the attachment suit. This is, in effect, merely Special Bail, and was so regarded in Mississippi, where it was held, that the abolishment by law of imprisonment and bail for debt, abolished the right to take such a bond in an attachment suit.[1] In some States, as under the custom of London, the defendant is not allowed to plead to the action until he has given such a bond; but generally he may appear without it.

§ 313. It is the defendant's right to give this bond at any time before judgment, as well where his effects are reached by garishment, as where levied on and taken into the officer's possession.[2] This right is a privilege accorded by law to, and not a duty enjoined upon, the defendant, and the plaintiff cannot complain if it be not exercised.[3]

§ 314. In taking this bond the officer is not to be regarded as the agent of the plaintiff, so as to render the plaintiff responsible for his neglect of duty. Therefore, where the officer, without levying the attachment, suffered the defendant, without the plaintiff's knowledge, to execute a bond, with surety, to pay the debt; which was considered not to be in conformity to the statute governing the case; the court considered the officer as rather the agent of the obligors in the bond, and that the plaintiff was entitled to his recourse on the bond as a good common-law bond, and that the obligors, if injured by the act of the officer, should look to him for redress.[4]

[1] Garrett *v.* Tinnen, 7 Howard (Mi.), 465. See Childress *v.* Fowler, 9 Arkansas, 159; Gillaspie *v.* Clark, 1 Tennessee, 2.
[2] Lecesne *v.* Cottin, 10 Martin, 174.
[3] Watson *v.* Kennedy, 8 Louisiana Annual, 280.
[4] Cook *v.* Boyd, 16 B. Monroe, 556.

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§ 315. Where an attachment issues against two joint debtors, and their joint and separate effects are attached, it was held by the United States Circuit Court of the District of Columbia, that one of them could not appear and give bail to discharge his separate effects, unless bail and appearance were entered for both.[1]

§ 316. If the statute requires more than one surety, and only one is given, the obligors, when sued on the bond, cannot object to its validity on that account; for the plurality of sureties is for the benefit of the creditor, and he may dispense with more than one, without invalidating the instrument.[2]

§ 316 *a*. If there be no statute authorizing it, the court has no power to order new sureties to be given in such a bond, on the ground that those first taken have become insolvent. The law is complied with by the giving of the bond, without reference to the subsequent ability of the sureties to respond to its obligation.[3]

§ 317. In Kentucky, Illinois, and Mississippi, from the time of the execution of the bond, the cause ceases to be one of attachment, and proceeds as if it had been instituted by summons;[4] and in South Carolina and Georgia, where the statute does not declare that the execution of the bond shall have the effect of dissolving the attachment, it is held, nevertheless, that it has that effect.[5] In Louisiana, Article 259 of the Code of Practice is as follows: "The defendant, if he appear, either in person or by his attorney, may, in every stage of the suit, have such attachment set aside, by delivering to the sheriff his obligation for the sum, exceeding by one half that which is demanded, with the surety of a good and solvent person, residing within the jurisdiction of the court where the action is brought, that he will satisfy such judgment as may be rendered against him in the suit pending." Under this provision it was held, that a defendant executing the obliga-

[1] Magee *v.* Callan, 4 Cranch, C. C. 251.

[2] Ward *v.* Whitney, 3 Sanford, Sup. Ct. 399; s. c. 4 Selden, 442.

[3] Dudley *v.* Goodrich, 16 Howard Pract. R. 189; Hartford Quarry Co. *v.* Pendleton, 4 Abbott Pract. R. 460.

[4] Harper *v.* Bell, 2 Bibb, 221; People *v.* Cameron, 7 Illinois (2 Gilman), 468; Philips *v.* Hines, 33 Mississippi, 163.

[5] Fife *v.* Clarke, 3 M'Cord, 347; Reynolds *v.* Jordan, 19 Georgia, 436. See McMillan *v.* Dana, 18 California, 339.

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tion, rendered himself liable to a judgment *in personam*, whether he was served with process or not.[1]

But under many attachment systems this bond may be given by third persons, without the joinder of the defendant with them; and in such case their execution of the bond is neither in fact nor in law an appearance by the defendant to the action, nor does it authorize the supposition that he had any knowledge or notice of it, or any opportunity to appear and defend it.[2]

§ 318. In Mississippi, the court seemed to consider that the execution of the bond released any technical objections to the preliminary proceedings;[3] while by the Supreme Court of the United States, and that of Missouri, it was held, that thereafter the defendant could not take any exception to the attachment, or to the regularity of the proceedings under it.[4] In Louisiana, however, a different rule prevails. There, under the statute cited in the next preceding section, when property is seized under an attachment, and the defendant is not served with process, the court is required to appoint an attorney to represent him; and it was held, to be admissible for the attorney so appointed, to show that the property attached was not the defendant's, and that, therefore, the court had no jurisdiction of the action.[5] Afterwards, it was decided that the defendant himself, after giving bond, might contest the truth of the allegation on which the attachment issued, in order to procure the dissolution of the attachment; and this expressly on the ground that it was necessary to relieve himself and his surety from the obligation of the bond.[6] Subsequently the court further decided that the obligors in a bond of this description, *to which the attachment defendant was not a party*, might, when sued upon it, set up as a defence, that the property was not the defendant's, and that he had not been served with process, and that, therefore, the judgment against him was a nullity.[7] And in Arkansas it was held, that the execution of the bond did not pre-

[1] Rathbone *v.* Ship London, 6 Louisiana Annual, 439; Kendall *v.* Brown, 7 Ibid. 668; Love *v.* Voorhies, 13 Ibid. 549.

[2] Clark *v.* Bryan, 16 Maryland, 171.

[3] Wharton *v.* Conger, 9 Smedes & Marshall, 510.

[4] Barry *v.* Foyles, 1 Peters, 311; Payne *v.* Snell, 3 Missouri, 409.

[5] Schlater *v.* Broaddus, 3 Martin, N. S. 321; Oliver *v.* Gwin, 17 Louisiana, 28.

[6] Paihles *v.* Roux, 14 Louisiana, 82; Myers *v.* Perry, 1 Louisiana Annual, 372. Kendall *v.* Brown, 7 Ibid. 668.

[7] Quine *v.* Mayes, 2 Robinson (La.), 510

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clude the defendant from interposing pleas in abatement founded on irregularities in the proceedings.[1]

§ 319. In New York, a similar view was entertained, in an action on a bond, conditioned to pay the plaintiff in the attachment the amount justly due and owing to him by the defendant, at the time the plaintiff became an attaching creditor, on account of any debt claimed and sworn to by the plaintiff, with interest, costs, &c. The action was against the surety in the bond, and the declaration set forth the affidavit on which the attachment issued, the issuing of the writ, the attachment defendant's application to the judge to discharge the warrant, and that, for the purpose of procuring such discharge, the bond sued on was executed; and concluded with an averment of the indebtedness of the attachment defendant to the plaintiff. The question presented was, whether the affidavits on which the attachment issued were sufficient to authorize the issuing of the writ. It was decided that they were not, and therefore, that the proceedings in the attachment were void; and such being the case, that the bond was also void.[2]

This case was under the Revised Statutes of New York, where the affidavit for an attachment was the foundation of the jurisdiction; and the impeachment of its sufficiency assailed the jurisdiction of the court in the attachment suit. The decision was, that, as there was no jurisdiction of the suit, the bond could not be enforced.

But where, as under the New York Code of Procedure, the attachment is not process by which the suit is commenced, but merely a provisional remedy, it was held, that the statements in the affidavit on which it issued are not jurisdictional facts; that the attachment is not void if those statements are insufficient; and that therefore the sufficiency and truth of those statements cannot be inquired into in an action on a bond given to secure the payment of such judgment as might be recovered in the action in which the attachment was issued.[3] Much less can the attachment defendant, in an action on such bond, object to the regularity of the proceedings in the attachment suit.[4]

[1] Childress *v.* Fowler, 9 Arkansas (4 English), 159; Delano *v.* Kennedy, 5 Ibid. 457
[2] Cadwell *v.* Colgate, 7 Barbour, 253.
[3] Cruyt *v.* Phillips, 16 Howard Pract. R. 120.
[4] Dunn *v.* Crocker, 22 Indiana, 324.

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In California, it was held, that in an action on such a bond, no proof was necessary of the preliminary proceedings connected with or preceding the levy; for the admission of the levy, contained in the bond, is enough.[1]

§ 320. But in a suit on such a bond, is the plaintiff bound, as was done in the case just cited, to show in his declaration, or otherwise, the facts necessary to give jurisdiction to the officer who issued the attachment, or that the case was one in which an attachment might be issued according to the statute? This question was passed upon by the New York Court for the Correction of Errors, in the negative. Chancellor WALWORTH, in delivering his opinion, which was almost unanimously sustained by the court, said: "I am not aware of any principle of the common law which requires the obligee in such a bond, when he brings a suit thereon against the obligors, to do anything more in his declaration than to state the giving of the bond by the defendants, and to assign proper breaches of the condition to show that the bond has become forfeited; and to enable the jury to assess the damages upon such breaches, as required by the statute relative to suits upon bonds other than for the payment of money. And where the execution of the bond is admitted or proved upon the trial, and the breach of the condition thereof is also proved, the *onus* of establishing the fact that the bond was improperly obtained, by coercion or otherwise, as by an illegal and unauthorized imprisonment of the defendants, or in consequence of an illegal detention of their goods under color of an attachment granted by an officer who had no authority to issue the same, is necessarily thrown upon them."[2]

§ 321. In Louisiana, under the Article above quoted, it is held, that after the giving of such a bond, the property attached is no longer under the control of the court. There, cotton was attached, and released on a bond being given; and afterwards a third party intervened and claimed the cotton to be his; but the court refused to hear evidence or entertain the intervention, because the defendant had bonded the cotton. The Supreme Court sustained this decision, holding the property to be no longer under the control of the court; that the bond was a substitute for the

[1] McMillan v. Dana, 18 California, 339. [2] Kanouse v. Dormedy, 3 Denio, 567.

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property; and that the intervenor must look to the property itself.[1]

§ 322. Such bond is available to the plaintiff only, for the satisfaction of such judgment as he may obtain against the defendant. If he fail to obtain a judgment, the bond is discharged. Third parties, claiming the attached property, can have no recourse upon the bond, there being no privity between them and the obligors.[2] And the judgment obtained against the defendant, *where he is not a party to the bond*, must be a valid judgment, in order to sustain an action on the bond. If the judgment be taken without any jurisdiction in the court, no action can be maintained on the bond for its satisfaction.[3]

§ 322 *a*. In order to a recovery upon such a bond it is not necessary that the judgment against the defendant in the attachment suit should express that it is with privilege on the property attached. The obligors undertake to pay any judgment which may be recovered against the defendant; and as the execution of the bond authorizes a personal judgment against him, it is not requisite that the judgment should make reference to the attachment, in order to give a right of action on the bond.[4]

§ 323. The obligation of the bond cannot be discharged by a surrender of the property attached.[5] Nor can the obligors, when sued thereon, defend themselves by showing that the property was not the defendant's when it was attached;[6] or that it was not subject to attachment;[7] or that no property was attached;[8] or that the grounds for obtaining the attachment were insufficient.[9] Nor are they discharged by the arrest and commitment of the defend-

[1] Dorr *v.* Kershaw, 18 Louisiana, 57; Beal *v.* Alexander, 1 Robinson (La.), 277; s. c. 7 Ibid. 349; Benton *v.* Roberts, 2 Louisiana Annual, 243; Monroe *v.* Cutter, 9 Dana, 93; McRae *v.* Austin, 9 Louisiana Annual, 360. See McMillan *v.* Dana, 18 California, 339.

[2] Dorr *v.* Kershaw, 18 Louisiana, 57; Beal *v.* Alexander, 7 Robinson (La.), 349.

[3] Clark *v.* Bryan, 16 Maryland, 171.

[4] Love *v.* Voorhies, 13 Louisiana Annual, 549.

[5] Dorr *v.* Kershaw, 18 Louisiana, 57.

[6] Beal *v.* Alexander, 1 Robinson (La.), 277; Hazelrigg *v.* Donaldson, 2 Metcalfe (Ky.), 445.

[7] McMillan *v.* Dana, 18 California, 339.

[8] Frost *v.* White, 14 Louisiana Annual, 140.

[9] Hazelrigg *v.* Donaldson, 2 Metcalfe (Ky.), 445.

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ant, under a *ca. sa.* issued by the plaintiff, in the same action, after the condition of the bond is broken.[1] Nor can they object to the amount of the judgment recovered in the original suit.[2] Nor will it avail them as a defence, that, after judgment and execution were obtained against the defendant, they pointed out to the plaintiff property of the defendant, out of which he could make his claim, and at the same time tendered him money to defray the expenses and charges of the proceeding.[3] Where obligors in such a bond were sued thereon, and defended themselves upon the ground that an appeal had been *prayed* and *allowed* from the judgment in the attachment suit, it was held to be no defence, and that it should have been shown that the appeal was *pending* and *undetermined*.[4]

§ 324. In Arkansas it is held, that the sureties in a bail-bond in attachment, may be sued thereon without issuing execution against the principal. It is sufficient to aver the judgment against him, and its non-payment.[5]

§ 325. In Tennessee, in an action on such a bond, the plaintiff entered a *nolle prosequi* as to one of the principals in the bond, and took judgment against the other principal and the sureties; and the court held, that the judgment was erroneous, because the voluntary discharge of one of the principals by the plaintiff operated as a discharge of the sureties from the obligation of their bond.[6]

§ 326. In Louisiana, a case arose, not strictly of the nature of those we are now considering, but bearing such resemblance to them as to be properly noticeable here. A steamboat, owned by several persons, was attached for the debt of one of the owners. The other owners, to relieve the boat from the attachment, came forward and filed their claim for the three fourths of the vessel, offering at the same time to give security to account for such part as should be found to belong to the defendant upon a final adjustment of their respective claims and accounts, upon a due appraisement and sale of the interest and share of the defendant; and the court ordered the boat to be delivered to them, on their

[1] Murray v. Shearer, 7 Cushing, 333.
[2] Morange v. Edwards, 1 E. D. Smith, 414.
[3] Hill v. Merle, 10 Louisiana, 108.
[4] Poteet v. Boyd, 10 Missouri, 160.
[5] Lincoln v. Beebe, 11 Arkansas, 527.
[6] Harris v. Taylor, 3 Sneed, 526.

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executing bond, with security, "to abide the judgment of the court in the premises." Judgment was rendered against the defendant, only a part of which was satisfied out of the proceeds of the sale of his share in the boat, and the plaintiff sued the parties to the bond to recover the balance. But the court decided, that the bond must be understood in relation to their obligation to account for the share of their coproprietor; and that, should it remain doubtful, from the manner in which the order of the court and the bond were worded, whether the obligors intended anything more than making themselves responsible for the share of the defendant, justice commanded to put upon the bond the most equitable construction, and to reject an interpretation which would tend to make them pay the defendant's debt, not only out of his share, but out of their own.[1]

§ 327. II. *Delivery Bonds.* This description of instrument is variously styled Delivery, Forthcoming, or Replevy Bond.[2] It is usually conditioned for the delivery of the property to the officer, either to satisfy the execution which the plaintiff may obtain in the cause, or, when and where the court may direct. Sometimes the alternative is embraced, of the delivery of the property *or* the satisfaction of the judgment recovered in the action. Such a bond is no part of the record in a cause, and cannot be looked to, to explain or contradict the sheriff's return.[3]

§ 327 *a*. Though a bond of this description be given where not authorized by statute, or in terms variant from those prescribed, yet it is not therefore necessarily invalid; but it will be good as a common law bond, where it does not contravene public policy, nor violate a statute.[4]

[1] Nancarrow *v.* Young, 6 Martin, 662.

[2] In M'Rae *v.* M'Lean, 3 Porter, 138, HITCHCOCK, J., said in delivering the opinion of the court: "The term *replevy*, in its general sense, includes every return of property levied on, for whatever cause, and under whatever conditions the same may be subject to, whether the lien is continued or discharged; and the question of lien or no lien depends more upon the nature of the stipulations entered into in the bond, than upon the particular circumstances which may attend the case. All our injunction and writ of error bonds are replevy bonds; yet there is no lien retained on the property attached, the conditions being to pay and satisfy the judgment or decree of the court whenever made."

[3] Kirksey *v.* Bates, 1 Alabama, 303.

[4] Sheppard *v.* Collins, 12 Iowa, 570. See Morse *v.* Hodsden, 5 Mass. 314; Barnes *v.* Webster, 16 Missouri, 258; Waters *v.* Riley, 2 Harris & Gill, 305.

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§ 327 *b*. It seems that this bond may be taken, as well where the attachment is served only by garnishment, as where tangible property is levied on. It was so held in Iowa, under a statute in these words: "The defendant may at any time before judgment discharge the property attached, or any part thereof, by giving bond, with surety to be approved by the sheriff, in a penalty at least double the value of the property sought to be released, conditioned that such property, or its estimated value, shall be delivered to the sheriff, to satisfy any judgment which may be obtained against the defendant in that suit, within twenty days after the rendition thereof."[1]

§ 328. No set form of words is necessary to make a valid bond of this description. Therefore, where a writing was given, in the nature of a condition to a penal bond, though no bond preceded the condition, it was held to be sufficient, on the following grounds: "It states what act, if performed, shall have the effect of rendering the supposed bond void. It implies an agreement on the part of the obligors for the performance of that act. It in effect stipulates that the property attached shall be forthcoming when ordered by the court to be returned to its custody. It shows that a duty had devolved on the persons executing the instrument, and imports an undertaking for the performance of that duty. Although it is unskilfully drawn, and has omitted an essential part of all penal obligations, yet we think an action of covenant can be maintained upon it. Any other construction would violate the obvious intention and understanding of the parties."[2]

§ 329. The addition to the bond of terms not required by law will not vitiate it as a statutory bond, or bar the prescribed remedies on it. Thus, where the statute required a bond "conditioned that the property shall be forthcoming to answer the judgment that may be rendered in the suit," and the bond given, after reciting the attachment, and that the obligors claimed to be the owners of the property attached, was conditioned that if the obligors should fail to substantiate their claim and should render up and have forthcoming the property, &c.; it was held, that the addition, "if the obligors should fail to substantiate their claim," did not affect the character of the bond, and that it might be

[1] Woodward *v.* Adams, 9 Iowa, 474. [2] Yocum *v.* Barnes, 8 B. Monroe, 496.

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proceeded on in the same manner as if that addition had not been made.[1]

§ 330. This bond differs from the contract of bailment of attached property, prevalent in New England and New York, to be treated of in a subsequent chapter, — 1. In deriving its existence from statute, and not from practice; 2. In being a specialty, instead of a simple contract; 3. In the officer being under legal obligation to release the property from actual custody, upon sufficient security being given; 4. In discharging the officer from liability for the property, at least unless he were guilty of impropriety in taking insufficient security; 5. In being recognized and proceeded upon in the courts as a part of the cause; 6. In being a contract which the plaintiff may enforce, for the satisfaction of his judgment.

§ 331. It differs, too, from a bail-bond, in that it does not discharge the lien of the attachment; since the very object of the bond is to insure the safe keeping and faithful return of the property to the officer, if its return should be required.[2] It follows, therefore, that after property is thus bonded, it cannot be seized under another attachment, or under a junior execution, either against the attachment debtor, or a third person claiming it adversely to the debtor and the creditor; for to hold otherwise would put it in the power of a stranger to the attachment suit, by a levy and sale, to cause a forfeiture of the condition of the bond.[3] And this, too, though the party giving the bond take the property into another State; for he is considered to have a qualified property in the thing, which the courts of every State must respect, wherever acquired.[4]

[1] Purcell *v.* Steele, 12 Illinois, 93; Sheppard *v.* Collins, 12 Iowa, 570.

[2] Gray *v.* Perkins, 12 Smedes & Marshall, 622; M'Rae *v.* M'Lean, 3 Porter, 138, Rives *v.* Wilborne, 6 Alabama, 45; Evans *v.* King, 7 Missouri, 411; People *v.* Cameron, 7 Illinois (2 Gilman), 468; Hagan *v.* Lucas, 10 Peters, 400; Boyd *v.* Buckingham, 10 Humphreys, 434. *Sed contra,* Schuyler *v.* Sylvester, 4 Dutcher, 487; Austin *v.* Burgett, 10 Iowa, 302.

[3] Rives *v.* Wilborne, 6 Alabama, 45; Kane *v.* Pilcher, 7 B. Monroe, 651. In Jones *v.* Peasley, 3 G. Greene, 53, it was held by the Supreme Court of Iowa, that a bond conditioned "that the attached property, or its appraised value, shall be forthcoming to answer the judgment of the court," discharges the property from the lien of the attachment, and leaves it subject to a subsequent attachment for the defendant's debts, and that the obligors cannot defend against the bond, because the property was subsequently attached by other creditors.

[4] Gordon *v.* Johnston, 4 Louisiana, 304.

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§ 332. By executing such a bond, the defendant is held to have acknowledged notice of the suit, and to be bound to enter an appearance, or be liable to be proceeded against as in case of personal service of process.[1]

§ 333. This bond cannot be executed, so as to constitute an effective and reliable security to the officer or the plaintiff, by any party not thereto authorized by law. If executed by one not so authorized, it will not be sustained, either as a statutory or common law bond.[2]

§ 334. Where the bond calls for the delivery of the property at a specified place, no demand is necessary.[3] When the property is to be delivered "when and where the court shall direct," an order of court for its delivery is necessary to render the obligors liable. The judgment of the court against the defendant in the attachment suit, and an execution issued to the sheriff, do not constitute an order to the obligors to deliver the property at a given time and place.[4]

Where the bond is for the delivery of the property within a stipulated time after the rendition of a judgment in favor of the plaintiff in the attachment suit, it is not necessary, to sustain an action on the bond, that an order should be made that the judgment should be a lien on the attached property, or directing the sale of the property. The right of action is complete upon the failure to deliver the property within the stipulated time.[5]

§ 335. The surety in any such bond may exonerate himself therefrom, by delivering the property to the officer, at any time before judgment is rendered against him on the bond.[6] This delivery must be an actual one, — that is, the property must be brought, and pointed out, and offered to the officer. Therefore, where a forthcoming bond was given for a slave, and the principal, on the day the slave was to be delivered, met the officer crossing the street rapidly, and said to him, "Here is the boy; I have

[1] Wilkinson *v.* Patterson, 6 Howard (Mi.), 193.
[2] Cummins *v.* Gray, 5 Stewart & Porter, 397; Sewall *v.* Franklin, 2 Porter, 493.
[3] Mitchell *v.* Merrill, 2 Blackford, 87.
[4] Brotherton *v.* Thomson, 11 Missouri, 94.
[5] Waynant *v.* Dodson, 12 Iowa, 22.
[6] Reagan *v.* Kitchen, 3 Martin, 418; Hansford *v.* Perrin, 6 B. Monroe, 595.

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brought him to release J. on that bond"; and the officer replied, "Very well"; but the slave was not pointed out, and the officer did not see him; it was held to be no proper delivery.[1]

§ 336. The signers of such a bond cannot object that it is not their deed, because it was written over their signatures delivered to the officer in blank, instead of their signatures being affixed after the instrument was written. In such case the officer acts as the agent of the obligors in filling up the writing, and may prove his agency; and if he be dead, his declarations in relation to it may be given in evidence, as part of the *res gestæ*.[2] In the case in which this was decided, all the parties to the paper wrote their names upon it, with the intention that it should be filled up as a forthcoming bond, and delivered it to the officer for the purpose of being so filled up. But where the paper is signed by a surety with an understanding that others are to sign it with him, and it is delivered without their signatures being obtained, the surety will not be bound. This was so held in Louisiana, where a surety signed a bond in which the names of three principals were written, only one of whom signed it;[3] and in Mississippi, where the surety signed, under a representation that two others would become co sureties with him, and the bond was delivered without their signatures having been obtained.[4]

§ 337. The seizure of property under attachment, upon which the party having it in possession has a lien, cannot devest the lien. And if such party release it by giving bond, it seems he will be responsible on the bond for no more than the balance which may remain in his hands after paying himself the amount due him.[5]

§ 338. In Kentucky, under their practice of attachment in chancery, it was held, that suit on a bond for the forthcoming of attached property was prematurely brought, where the Chancellor had not disposed of the case, and remitted the party to his remedy

[1] Pogue *v.* Joyner, 7 Arkansas (2 English), 462.
[2] Yocum *v.* Barnes, 8 B. Monroe, 496.
[3] Clements *v.* Cassilly, 4 Louisiana Annual, 380. See Bean *v.* Parker, 17 Mass. 591, Wood *v.* Washburn, 2 Pick. 24.
[4] Sessions *v.* Jones, 6 Howard (Mi.), 123. See Crawford *v.* Foster, 6 Georgia, 202.
[5] Canfield *v.* M'Laughlin, 10 Martin, 48.

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on the bond.[1] In the same State it was held, in relation to such a bond, that the surety ought not to be proceeded against alone, where the principal was within reach of the process of the court.[2] And in Louisiana, the surety cannot be made liable, until restoration of the property or payment of the bond has been demanded of the principal.[3] But it is not necessary that a demand upon the security, or notice to him of the order of the court for the delivery of the property, should be shown, in order to sustain a proceeding against him on the bond.[4]

§ 339. In an action on a bond of this description, the obligors cannot complain that the penalty in it is not as large as the law required;[5] nor is it competent for them to aver that the property attached was not the defendant's, but belonged to a third person, who took it into his possession, whereby they were prevented from having it forthcoming to answer the judgment of the court. They are estopped by the bond from contesting the defendant's right to the property. They undertake to have it forthcoming, and it is their duty to comply with their obligation, and leave it to the plaintiff in the attachment and the claimant of the property to litigate their rights; not to take it out of the possession of the plaintiff, and put it into that of an adverse claimant, and thus excuse themselves for a breach of their covenant.[6] Equally are the parties to such a bond estopped from denying the admissions made in the condition of the bond, or controverting their existence. Therefore, where a bond recited the issuing of an attachment and its levy on the property, it was held, that the obligors

[1] Hansford v. Perrin, 6 B. Monroe, 595.
[2] Page v. Long, 4 B. Monroe, 121.
[3] Goodman v. Allen, 6 Louisiana Annual, 371.
[4] Weed v. Dills, 34 Missouri, 483.
[5] Jones v. M. and A. Railroad Co., 5 Howard (Mi.), 407.
[6] Sartin v. Wier, 3 Stewart & Porter, 421; Gray v. MacLean, 17 Illinois, 404; Dorr v. Clark, 7 Michigan, 310. In Iowa, where such a defence is allowed by statute, it was held not sufficient to aver that the property was not the defendant's; but the plea must show whose it was. Blatchley v. Adair, 5 Iowa, 545. In Kentucky, in an action on a bond, the undertaking of which was, "that the defendant S. shall perform the judgment of the court in this action, or that the undersigned H. will have the seventy five hogs attached in this action, or their value, $412, forthcoming and subject to the order of the court for the satisfaction of such judgment"; it was held, that the owner of property, attached in an action against a third person, who gives such a bond in order to retain his possession, is not thereby precluded from asserting his claim to the property, or disputing the validity of the attachment. Schwein v. Sims, 2 Metcalfe (Ky.), 209. See Halbert v. McCulloch, 3 Ibid. 456.

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could not, in an action on the instrument, deny that an attachment had issued and been levied.[1] And where a party gave bond to hold attached property or its proceeds subject to the judgment of the court, it was held, that he could not set up as a defence against the bond, that the sheriff to whom it was given had no legal or equitable interest in the property.[2] And where the condition of the bond was the delivery of the attached property to the sheriff, in the event of a judgment being rendered against the defendant, it was held, that it was no defence to a surety that the judgment against the defendant did not order the property to be sold.[3]

§ 340. Where statutory provision is made allowing a party other than the defendant to retain attached property, on executing a forthcoming bond therefor, if such party claim to be the owner of the property, he must nevertheless return it to the officer, and then assert his claim. He cannot set up his ownership as a defence to an action on the bond.[4]

§ 341. If the obligors in the bond are prevented by the act of God from delivering the property, their liability is discharged Therefore, where the bond was for the forthcoming of a slave, who died before the parties were bound to deliver him, it was decided that they were not responsible.[5]

§ 342. The measure of recovery on a delivery bond, is the value of the property secured by it, not exceeding the amount of the plaintiff's recovery in the attachment suit. If the value be stated in the bond, it will be conclusive on the obligors; if not stated, it must be established by proof. Where, therefore, the bond was in double the amount of the demand in the attachment suit, it was held to be error, in the absence of proof of value, for the court to instruct the jury, that they should assume the half of the penalty of the bond to be the true value of the property.[6]

[1] Crisman v. Matthews, 2 Illinois (1 Scammon), 148.
[2] Morgan v. Furst, 4 Martin, N. S. 116.
[3] Guay v. Andrews, 8 Louisiana Annual, 141.
[4] Braley v. Clark, 22 Alabama, 361; Cooper v. Peck, Ibid. 406; Morgan v. Furst, 4 Martin, N. S. 116.
[5] Falls v. Weissinger, 11 Alabama, 801.
[6] Collins v. Mitchell, 3 Florida, 4; Moon v. Story, 2 B. Monroe, 354; Weed v. Dills, 34 Missouri, 483.

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§ 343. If one joint obligor in a delivery bond be compelled to pay the whole amount of a judgment recovered on the bond, he may maintain an action against his co-obligor for contribution.[1]

[1] Labeaume v. Sweeney, 17 Missouri, 153.

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CHAPTER XIV.

BAILMENT OF ATTACHED PROPERTY.

§ 344. In the New England States and New York, a practice exists, which allows an officer who has attached personal property on *mesne* process, to dispense with his own actual custody thereof, by delivering it to some other person,—usually a friend of the defendant, though the plaintiff may lawfully become the bailee,[1] —and taking from him a writing, acknowledging the receipt, and promising to redeliver the property to the officer on demand. This practice has not its authority in any statutory provision; but it is nevertheless in constant use in those States; and though not regarded as one to which the officer is officially bound to conform,[2] has yet become so well settled, and is so far held in regard, that the Superior Court of New Hampshire remarked, that "there are cases in which a sheriff, if he should refuse to deliver goods to a friend of the debtor, upon an offer of good security, would deserve severe censure."[3] The same court said: "It is true that when goods are attached the sheriff may retain them in his own custody in all cases, if he so choose. But it would often subject him to great inconvenience and trouble so to retain them. In many cases, the interest both of the debtor and the creditor requires that they should be delivered to some person, who will agree to be responsible for them. And it is a common practice so to deliver them; a practice which is not only lawful, but in a high degree useful and convenient."[4] It seems from a recent

[1] Tomlinson *v.* Collins, 20 Conn. 364.

[2] Davis *v.* Miller, 1 Vermont, 9; Moulton *v.* Chadborne, 31 Maine, 152.

[3] Runlett *v.* Bell, 5 New Hamp. 433. The Supreme Court of Vermont, in relation to this practice, said: "The taking of a receipt for property attached is a common mode of perfecting an attachment. It saves expense to all the parties, relieves the officer of the care and custody of the property, and gives the creditor all he seeks for by his attachment, viz. security for his debt. It is at once so convenient and so safe a mode of securing all the purposes of an attachment that it has been adopted universally in practice; and though not authorized by statute, is recognized in law as an official act having definite and well-settled rights, duties, and obligations." Austin *v.* Burlington, 34 Vermont, 506.

[4] Runlett *v.* Bell, 5 New Hamp. 433. In Phelps *v.* Gilchrist, 8 Foster, 266, Bell, J., used the following language in reference to this practice: "The practice of delivering

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decision in Maine, that the consent of the plaintiff to this bailment is necessary to discharge the officer from responsibility to him for the property. If the goods be delivered to a receipter, without the plaintiff's consent, the officer will be liable to him at all events for them, if they are needed to satisfy an execution obtained by the plaintiff.[1] But it was also held, in the same State, that if an attachment plaintiff approve the ability of a receipter for attached property, that does not exonerate the officer from making effort to find the property to respond to execution, or from the duty of bringing a suit upon the receipt.[2]

§ 345. This contract of bailment does not seem to be uniform in its terms, either throughout the States in which it is resorted to, or in any one of them, but varies according to the circumstances of the case, or the intent of the parties. Sometimes, and most frequently, the bailee simply acknowledges to have received from the officer certain goods, attached by the latter in a case named, which he agrees to return to the officer on demand. Sometimes the value of the goods is stated; and not unusually the contract is in the alternative, either to return the goods, or pay the debt and costs in the case. In such case the receipt is none the less a positive contract to redeliver the goods; the alternative embraced in it does not authorize the bailee to refuse to surrender the goods, nor can it in any sense be construed as vesting in him a power of sale.[3] In such case the bailee cannot require the officer to take an equal quantity of goods of the same kind and quality, or discharge himself by paying the officer the

property attached to a bailee for safe keeping, must have been coeval with the practice of making such attachments. It is, in its nature, a simple deposit, a delivery of the property to be kept by the depositary, without compensation, until called for by the attaching officer. No particular agreement was necessary, and no writing was required. The convenience and safety, perhaps of both parties, would render some writing, showing the facts, necessary, in cases where the number of the articles attached was considerable. In general, a simple receipt, admitting that the articles enumerated had been delivered by the officer to the receipter for safe keeping, and to be returned, on request, would be the most natural form of such a writing. Various circumstances, which might become material to the parties, would as naturally be introduced, as their utility came to be seen, until everything supposed to be otherwise likely to be an occasion of dispute, would be mentioned. . . . . There is ordinarily, however, nothing in such a receipt which changes the duties or obligations of the parties, from what they would be, on a simple deposit, without any writing whatever. Usually the sole advantage of the writing is, that it contains evidence of facts which, in the event of any controversy, may be disputed, and may sometimes be difficult of proof."

[1] Moulton *v.* Chadborne, 31 Maine, 152; Franklin Bank *v.* Small, 24 Ibid. 52.

[2] Allen *v.* Doyle, 33 Maine, 420.

[3] Sibley *v.* Story, 8 Vermont, 15.

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value of the goods; but he must return the identical articles delivered to him, or pay the debt.[1] Occasionally, too, the receipt gives the bailee the alternative, of returning the goods or indemnifying the officer against all damages he may sustain in consequence of his having attached the property. In such a case, where an action was brought on the receipt, it was urged at bar that the receipt being in the alternative gave the receipter, at his election, the right to return the property or indemnify the officer; and that if he did not return the property on demand, the alternative became absolute, and no action would accrue on the contract till the officer had been damnified. But the court said: "This is not a sound construction of the contract, and cannot be conformable to the intent of the parties. The officer had no power to make any disposition of the property otherwise than for safe keeping; and to construe this contract, in effect, as a conditional sale, would pervert the very object of the parties. The only effect which the latter clause in the receipt can have is to measure the extent of the receipter's liability, and is no more than a legal result of a non-delivery of the property."[2] But where the contract of the receipter is to pay the officer a specified sum, or redeliver the property on demand, it is held, in Maine, that the receipter has the election, to pay the money or deliver the property; that the officer must be considered as having abandoned his possession; and that the attachment is thereby dissolved.[3]

§ 346. Usually the receipt makes specific mention of the goods attached; and this is always desirable, but not necessary to the legality of the contract. Whatever can, by just implication, be construed as acknowledging the receipt of property, to be redelivered to meet the exigency of the attachment, will be sufficient. As, for instance, a paper in the following form — "Value received, I promise to pay B., deputy sheriff, $400 on demand and interest, — said note being security to said B. for a writ C. *vs.* D. which is this day sued" — was held to be in effect an acknowledgment of property to that amount received as attached on the writ, and a valid receipt.[4]

[1] Anthony *v.* Comstock, 1 Rhode Island, 454.
[2] Page *v.* Thrall, 11 Vermont, 230.
[3] Waterhouse *v.* Bird, 37 Maine, 326; Waterman *v.* Treat, 49 Ibid. 309.
[4] Bruce *v.* Pettengill, 12 New Hamp. 341.

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§ 347. Over this contract the plaintiff in the action has no control; but it is taken by the officer for his own security, that he may be enabled to discharge the responsibility he has assumed in his official capacity. But if, after the plaintiff has obtained judgment in his action, the officer deliver a receipt taken therein for goods, to the plaintiff's attorney, to be prosecuted for the plaintiff's benefit, this is an equitable assignment of it, which will preclude the officer from interfering with the avails of the receipt when judgment has been obtained on it, though obtained in his name.[1]

§ 348. An officer having attached chattels, becomes liable for them, at the termination of the suit, either to the plaintiff or the defendant; to the former, if he obtain judgment, and issue execution, and take the necessary steps to have it levied pursuant to the attachment; to the latter, if the attachment be dissolved, by judgment in his favor, or otherwise. Under such circumstances it is manifest that a bailment of the property, if it were not recognized as a legal act of the officer, would not in any way affect his relations to the plaintiff and defendant; and consequently he would be under the necessity, either of retaining the property in his own actual custody, or of assuming upon himself the entire responsibility of suffering it to go into the hands of a third person. But we have seen that the bailment, wherever this practice prevails, is regarded as a legal act; and it must needs be, therefore, that questions will arise as to the rights, duties, and liabilities of all the parties. These we will now proceed to consider.

§ 349. That which seems to lie nearest the foundation of this subject, is the relation which is established by the contract of bailment between the officer and the bailee. This has been the subject of frequent discussion, and the conclusion seems to have been generally arrived at, that the bailee is to be viewed in the light of a servant or agent of the officer.[2] In New York he was

[1] Clark v. Clough, 3 Maine, 357; Jewett v. Dockray, 34 Ibid. 45; Phillips v. Bridge, 11 Mass. 242.

[2] Ludden v. Leavitt, 9 Mass. 104; Warren v. Leland, Ibid. 265; Bond v. Padelford, 13 Ibid. 394; Commonwealth v. Morse, 14 Ibid. 217; Brownell v. Manchester, 1 Pick. 232; Small v. Hutchins, 19 Maine, 255; Eastman v. Avery, 23 Ibid. 248; Barker v. Miller, 6 Johns. 195; Brown v. Cook, 9 Ibid. 361; Dillenback v. Jerome, 7 Cowen, 294; Mitchell v. Hinman, 8 Wendell, 667; Gilbert v. Crandall, 34 Vermont, 188.

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formerly regarded as a mere naked bailee, having no interest or property in the goods; and in Massachusetts such is the doctrine now; but however true this may be as between him and the officer, it will be seen, in another place,[1] that the weight of reason and authority is greatly in favor of his being considered as having rights in the property, as against third persons, which will enable him to maintain his possession of it. All questions, however, arising between him and the officer, will be found to be materially affected by their mutual relation being regarded as that of master and servant, or principal and agent.

§ 350. An officer, by the levy of an attachment, acquires a special property in the goods seized. As long as the attachment continues in force, and its lien upon the property remains undisturbed, that special property exists, and enables the officer to maintain his rights acquired by the levy. An indispensable element of the continued existence of the lien is, the officer's continued possession of the property, actual or constructive, that is, personally or by another. As the bailment of it is, for the time, a surrender of his personal or actual possession, the question is presented, — what is the effect of the bailment on the lien of the attachment?

§ 351. In Massachusetts, it was once held to be very clear, that after an officer had delivered attached property to a receipter, and taken his receipt therefor, and his promise to redeliver it on demand, it could no longer be considered as in the constructive possession of the officer.[2] But this view is wholly inconsistent with other decisions in the same State,[3] and not less with the doctrine maintained there in numerous cases, that the special property of the officer in the goods continues after the bailment, and that the receipter is the mere servant of the officer, having himself no rights in the goods, and therefore unable even to maintain legal remedies for the disturbance of his possession. Equally is it opposed to the current of authority elsewhere. In Vermont, New Hampshire, and Connecticut, it has always been considered that the delivery of attached property to a receipter, and taking his receipt therefor,

[1] Post, § 367.
[2] Knap v. Sprague, 9 Mass. 258.
[3] Bond v. Padelford, 13 Mass. 394; Baker v. Fuller, 21 Pick. 318; Ludden v. Leavitt, 9 Mass. 104.

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does not discharge the lien of the attachment, or devest the officer of his custody of, or special property in, the goods.[1]

§ 352. In Maine, under a statute which declares "that when hay in a barn, sheep, horses, or neat cattle are attached on *mesne* process, at the suit of a *bonâ fide* creditor, and are suffered by the officer making such attachment to remain in the possession of the debtor, on security given for the safe keeping or delivery thereof to such officer, the same shall not, by reason of such possession of the debtor, be subject to a second attachment, to the prejudice of the first attachment"; it was held, that this was designed to preserve and continue the lien on the property attached, in the same manner as though it had remained in the exclusive possession of the officer; and that in such case the debtor cannot sell the property, and that even a *bonâ fide* purchaser of it without notice acquires no rights in it.[2]

§ 353. Since, then, the officer's special property is not lost by the bailment, and the bailee stands in the position of his servant, it follows that the officer, — where no time is stated in the receipt for the return of the goods, — may, at any time while his special property in them continues, or while he is responsible for them to any party in the suit, or to the owner of them, retake them into his actual possession, from the bailee, or from the defendant, if the bailee shall have suffered them to go back into his possession:[3] and this, as well where the bailment is the act of his deputy, and the receipt is taken by the deputy in his own name, as where the contract is in the name of the principal.[4] The Supreme Court of Maine expressed serious doubts whether the officer could retake

[1] Pierson *v.* Hovey, 1 D. Chipman, 51; Enos *v.* Brown, Ibid. 280; Beach *v.* Abbott, 4 Vermont, 605; Rood *v.* Scott, 5 Ibid. 263; Sibley *v.* Story, 8 Ibid. 15; Kelly *v.* Dexter, 15 Ibid. 310; Whitney *v.* Farwell, 10 New Hamp. 9; Tomlinson *v.* Collins, 20 Conn. 364.

[2] Woodman *v.* Trafton, 7 Maine, 178; Carr *v.* Farley, 12 Ibid. 328.

[3] Pierson *v.* Hovey, 1 D. Chipman, 51; Enos *v.* Brown, Ibid. 280; Beach *v.* Abbott, 4 Vermont, 605; Rood *v.* Scott, 5 Ibid. 263; Sibley *v.* Story, 8 Ibid. 15; Kelly *v.* Dexter, 15 Ibid. 310; Briggs *v.* Mason, 31 Ibid. 433; Odiorne *v.* Colley, 2 New Hamp. 66; Whitney *v.* Farwell, 10 Ibid. 9; Bond *v.* Padelford, 13 Mass. 394. But in Massachusetts, it was held in a late case, that a delivery of the attached goods by the receipter to the defendant, legally operates as a discharge of the attachment, and a termination of the attaching officer's special property in them. Baker *v.* Warren, 6 Gray, 527; Colwell *v.* Richards, 9 Ibid. 374. And the same view is held in Maine. Waterhouse *v* Bird, 37 Maine, 326; Stanley *v.* Drinkwater, 43 Ibid. 468.

[4] Baker *v.* Fuller, 21 Pick. 318; Davis *v.* Miller, 1 Vermont, 9.

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the property without the consent of the debtor or receipter;[1] but, upon both principle and authority, it is difficult to perceive why it may not be done.

§ 354. This right, where there is but one attachment, usually depends on the officer's responsibility to the plaintiff; that is, upon the necessity for his having the property in hand to satisfy the plaintiff's demand. If, by the dissolution of the attachment, that necessity has ceased to exist, and at the same time the bailee has suffered the property to go back into the defendant's hands, the officer, not being any longer responsible to either plaintiff or defendant for it, cannot demand it of his bailee. But if, upon the dissolution of the attachment, the property be still in the bailee's possession, the officer being bound to restore it to the defendant, or to the owner, may demand it from the bailee for that purpose.[2]

§ 355. If, while the property is still in the bailee's possession, the same officer lay a second attachment on it, his control over it is not terminated by the dissolution of that under which the bailment was created, if the second attachment remain in force; for by the second attachment he becomes responsible for the property to the plaintiff therein; and the bailee is responsible to him. That this should be so, depends, of course, on the legality of a second attachment, of which there can be no doubt.

§ 356. While attached property remains in the possession of the attaching officer, or of his bailee, no other officer can levy another attachment on it.[3] But he who has seized property under an attachment, so long as he has either actual or constructive possession of it, may attach it again, at the suit of the same or another plaintiff. This right extends over property in the hands of a receipter, as well as that in the officer's immediate custody. While it is in the receipter's possession, the second attachment may be made by the same officer, without an actual seizure, by the officer's returning that he has attached the property, and giving the receipter notice, with directions to hold it to answer the second writ. But if the receipter has permitted the property to go back into the

[1] Weston v. Dorr, 25 Maine, 176.

[2] Whittier v. Smith, 11 Mass. 211; Webster v. Harper, 7 New Hamp. 594.

[3] Watson v. Todd, 5 Mass. 271; Vinton v. Bradford, 13 Ibid. 114; Thompson v. Marsh, 14 Ibid. 269; Odiorne v. Colley, 2 New Hamp. 66; Sinclair v. Tarbox, Ibid. 135.

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defendant's hands, a second attachment cannot be made without a new seizure.[1] When an officer lays a second attachment on goods in the hands of a bailee, the latter may decline to hold them for the security of that attachment, and may return them to the officer;[2] but if he make no objection to holding them, his liability will be the same under the second as under the first attachment.

§ 357. As has been intimated, it is very usual for the receipter to permit the property to remain in the defendant's hands. Hence have arisen what are termed nominal attachments; that is, where the property is not actually seized, or, if seized, is left, at the time, in the defendant's possession, upon some friend of the defendant giving, in either case, a receipt therefor. Such an attachment is so far valid as to bind the officer for the value of the property, and to give force to the contract between him and the bailee; but, with respect to strangers, other creditors, or purchasers without notice, it is wholly inoperative.[3] The Supreme Court of Massachusetts on this point said: "Such transactions are always confidential; the sheriff takes his security from the friend of the debtor; and this friend is secured by, or relies upon, the debtor. They all act at their peril, and have it not in their power to affect the security of the attaching creditor, or by such means to withhold the property from other creditors."[4] Therefore, in all such cases, where the property remains in the debtor's hands, whether because never removed, or returned after a removal, though, as we have seen, the officer may at any time during the existence of the attachment, retake it from the defendant, if the matter be between him, the bailee, and the defendant only, yet the defendant may sell the property,[5] or it may be attached by other creditors.[6] And it is held in Massachusetts, that a delivery of the attached goods by the receipter to the defendant, legally operates as a discharge of the attachment, and a termination of the attaching officer's special property in them.[7]

[1] Knap v. Sprague, 9 Mass. 258; Whittier v. Smith, 11 Ibid. 211; Odiorne v. Colley, 2 New Hamp. 66; Whitney v. Farwell, 10 Ibid. 9; Tomlinson v. Collins, 20 Conn. 364.

[2] Whitney v. Farwell, 10 New Hamp. 9.

[3] Bridge v. Wyman, 14 Mass. 190.

[4] Bridge v. Wyman, 14 Mass. 190; Phillips v. Bridge, 11 Ibid. 242.

[5] Denny v. Willard, 11 Pick. 519; Robinson v. Mansfield, 13 Ibid. 139.

[6] Bridge v. Wyman, 14 Mass. 190; Dunklee v. Fales, 5 New Hamp. 527; Robinson v. Mansfield, 13 Pick. 139.

[7] Baker v. Warren, 6 Gray, 527.

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§ 358. It is not, however, every possession by a defendant of his property after an attachment and bailment of it, that will authorize a second attachment. If an officer or his bailee, still retaining his possession, *bonâ fide*, and from motives of humanity, suffer the defendant to use attached articles, which will not be injured by such use, the attachment is not thereby dissolved.[1]

§ 359. But if the bailee permits the defendant to hold and use the property as owner, the attachment is regarded as dissolved, so far as that the property may be attached by another officer who has no knowledge that a prior attachment is still subsisting.[2] What knowledge of such fact will suffice to prevent a second attaching officer from acquiring a lien on the property thus found in the defendant's hands may be a question. Merely knowing the fact that the property had been once under attachment will not be sufficient; for the officer might well presume that that attachment had been settled or dissolved. But if he know that the attachment and bailment still subsist, and that the property is in the hands of the defendant merely for his temporary convenience, he cannot acquire a lien by attaching it.[3]

§ 360. If the bailee go off and abandon all possession and custody of the property, and it is attached by another officer,[4] or come into the possession of an adverse claimant,[5] the lien of the first attachment is lost.

§ 361. An important question arises out of this practice of bailment, as to the liability of the officer for the fidelity and pecuniary ability of the bailee. It seems to be conceded, that, if the bailee is nominated or approved by the plaintiff, and he afterwards fail to deliver the property when required to meet the attachment, the officer cannot be held responsible for it.[6] All, however, that the creditor, by his consent to the bailment, is supposed to agree to, is to exonerate the officer from liability for losses occasioned by the

[1] Train *v.* Wellington, 12 Mass. 495; Baldwin *v.* Jackson, Ibid. 131; Young *v.* Walker, 12 New Hamp. 502.

[2] Whitney *v.* Farwell, 10 New Hamp. 9; Bicknell *v.* Hill, 33 Maine, 297.

[3] Young *v.* Walker, 12 New Hamp. 502.

[4] Sanderson *v.* Edwards, 16 Pick. 144.

[5] Carrington *v.* Smith, 8 Pick. 419.

[6] Donham *v.* Wild, 19 Pick. 520; Jenney *v.* Delesdernier, 20 Maine, 183; Rice *v.* Wilkins, 21 Ibid. 558; Farnham *v.* Gilman, 24 Ibid. 250.

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insolvency or want of fidelity of the bailee; but not for losses occasioned by the neglect of the officer to enforce his own rights and remedies against his bailee.[1] But if the bailee be selected by the officer, and afterwards fail to deliver the property, and the value of it cannot be made out of him, can the officer protect himself from liability for the value of the property?

§ 362. In Massachusetts, MORTON, J., said: "The officer who attaches personal property is bound to keep it in safety, so that it may be had to satisfy the execution which may follow the attachment. This duty he may perform himself, or by the agency of others. If he appoint an unfaithful, or intrust it with an irresponsible, bailee, so that it is lost through the negligence or infidelity of the keeper, or the insufficiency of the receipter, he will be responsible for the value of the property."[2] This doctrine was affirmed by Justice Story, who said that if goods intrusted to a bailee "were lost, or wasted, or the bailee should become insolvent, the officer would be responsible therefor to the creditor."[3] So, in Vermont, where a bailee sold the property, and converted the proceeds to his own use, it was held, that this was the same as a conversion by the officer, and made the latter liable for the property, without a previous demand of it from him being necessary.[4] And in the same State it was held, that the officer is responsible for the fidelity and solvency of his bailee, the latter being regarded as his mere servant.[5]

§ 363. On this point, we find the Superior Court of New Hampshire taking a different ground from that of Massachusetts and Vermont. The question there came up, in reference to the insolvency of the bailee. The court said: "To what extent is an officer responsible for goods by him attached upon an original writ, has not been settled in any adjudged case, which has occurred to us. He is, without doubt, to be considered as a bailee, and answerable for the goods, either to the debtor or the creditor, if they be lost by his neglect or fault.

"Is he answerable beyond this? We are, on the whole, of

[1] Pierce v. Strickland, 2 Story, 292.

[2] Donham v. Wild, 19 Pick. 520; Phillips v. Bridge, 11 Mass. 242; Cooper v. Mowry, 16 Ibid. 5.

[3] Pierce v. Strickland, 2 Story, 292.

[4] Johnson v. Edson, 2 Aikens, 299. [5] Gilbert v. Crandall, 34 Vermont, 188

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opinion that he is not. As no cases directly in point are to be found, we must resort to the rules which have been applied in analogous cases.

"It seems always to have been understood as settled law, that, when a sheriff takes bail in any suit, if the bail so taken be sufficient, in all appearance, when accepted as bail, the sheriff will not be liable for their insufficiency in the end to satisfy the judgment which the plaintiff may recover. And if, in replevin, the sheriff take persons as sureties in the replevin bond, who are apparently sufficient, he will not be responsible for their sufficiency, unless he was guilty of negligence in making inquiries as to their circumstances.

"There seems to us to be a very close analogy between the cases of taking bail and replevin bonds, and the case of delivering goods, which have been attached, to some person for safe keeping. It is true that when goods are attached, the sheriff may retain them in his own custody, in all cases, if he so choose. But it would often subject him to great inconvenience and trouble so to retain them. In many cases, the interest of both the debtor and the creditor requires that they should be delivered to some person, who will agree to be responsible for them. And it is a common practice so to deliver them; a practice which is not only lawful, but in a high degree useful and convenient. Indeed, there are cases in which a sheriff, if he should refuse to deliver goods to a friend of the debtor, upon an offer of good security, would deserve severe censure.

"We are, therefore, induced to hold, that if a sheriff deliver goods, which he has attached, to persons who are apparently in good circumstances, and such as prudent men would have thought it safe to trust, for safe keeping, he is not liable, if the goods be lost through the eventual insolvency of the persons to whom they may have been so delivered."[1] In a subsequent case the same court held, that the officer is not responsible for the tortious acts of his bailee, committed without his knowledge or consent.[2]

§ 364. Here, then, is a conflict of judicial decisions, between which we will not attempt to decide. The weight of authority

[1] Runlett v. Bell, 5 New Hamp. 433; Howard v. Whittemore, 9 Ibid. 134; Bruce v. Pettengill, 12 Ibid. 341.

[2] Barron v. Cobleigh, 11 New Hamp. 557.

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appears to be against the New Hampshire doctrine; but the reasoning upon which it is based is certainly calculated to shake the confidence which might otherwise be felt in the opposite opinion.

§ 365. What has been said with regard to the liability of the officer refers to his relation to the plaintiff. He is also liable to the defendant for a return of the property to him in the event of the attachment being dissolved, or the demand upon which it was issued being satisfied. Where, however, the bailment takes place with the consent of the defendant, the officer is not answerable to him for the property, until a reasonable time for recovering it from the bailee shall have elapsed, after the defendant has become entitled to have it returned to him.[1]

§ 366. Having thus stated, first, the general propositions bearing upon this contract, and then the rights and liabilities of the officer in relation to bailed property, we will now, before proceeding to the examination of his remedies, bestow attention on the rights and duties of the bailee.

§ 367. What rights does the bailee acquire, by the bailment, in and over the attached property? In Massachusetts, he has always been considered a mere naked bailee, having no property in the goods, and unable to maintain an action for them, if taken out of his custody by a wrongdoer. In a case of similar character, the court there once held differently; considering that a naked bailee, though he might not maintain replevin, — since, to sustain that action, property in the plaintiff, either general or special, is necessary, — yet might bring trover or trespass;[2] but in every case where the point has arisen in the case of a receipter of attached property, the same court has held that the receipter could maintain no action at all.[3] The same doctrine was long held in New York;[4] but has finally, after an extended discussion before the Court of Errors in that State, been discarded; and it is now held

[1] Bissell v. Huntington, 2 New Hamp. 142.

[2] Waterman v. Robinson, 5 Mass. 303.

[3] Ludden v Leavitt, 9 Mass. 104; Perley v. Foster, Ibid. 112; Warren v. Leland, Ibid. 265; Bond v. Padelford, 13 Ibid. 394; Commonwealth v. Morse, 14 Ibid. 217; Brownell v. Manchester, 1 Pick. 232; Whittier v. Smith, 11 Mass. 211.

[4] Dillenback v. Jerome, 7 Cowen, 294; Norton v. The People, 8 Ibid. 137; Mitchell v. Hinman, 8 Wendell, 667.

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there, that the receipter may maintain replevin.[1] The Superior Court of New Hampshire, at an early day, held, that for the purpose of vindicating his possession against wrongdoers, the receipter has a special property in the goods, and may maintain trover against one who takes them from him.[2] In Vermont, it was decided that the bailee has a possessory interest in the property, which will enable him to maintain trover for it against a wrongdoer; that in order to maintain the action it is not necessary to hold that he has property in the goods; and that his possession and responsibility over to the officer furnish sufficient title and just right for him to recover.[3] In Connecticut it is held, that the receipter may maintain trespass for a violation of his possession.[4] Justice STORY, in noticing the Massachusetts doctrine, says: "It deserves consideration, whether his possession would not be a sufficient title against a mere wrongdoer; and whether his responsibility over to the officer does not furnish a just right for him to maintain an action for injuries, to which such responsibility attaches."[5] And Chancellor KENT says: "Though the bailee has no property whatever in the goods, and but a mere naked custody, yet the better opinion would seem to be, that his possession is a sufficient ground for a suit against a wrongdoer."[6] It may, therefore, be considered that the weight of authority is largely against the doctrine advanced in Massachusetts; which seems alike repugnant to well-established principles, and to the justice due to bailees in such cases.

§ 368. A receipter's position resembles in one respect that of bail; in that he may at any time while liable on his receipt to the officer, retake the property from the defendant's possession, and deliver it to the officer, in discharge of his receipt.[7]

§ 369. Though the mere fact of the bailment gives the receipter no power of sale of the goods,[8] yet if he make such a sale with the assent of the debtor, and acting as his agent, it will have the

[1] Miller *v.* Adsit, 16 Wendell, 335.
[2] Poole *v.* Symonds, 1 New Hamp. 289; Whitney *v.* Farwell, 10 Ibid. 9.
[3] Thayer *v.* Hutchinson, 13 Vermont, 504.
[4] Burrows *v.* Stoddard, 3 Conn. 160.
[5] Story on Bailments, § 133.
[6] 2 Kent's Com. 568, note *e*.
[7] Bond *v.* Padelford, 13 Mass. 394; Merrill *v.* Curtis, 18 Maine, 272.
[8] Sibley *v.* Story, 8 Vermont, 15.

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same effect as if the property had been restored to the defendant, and the sale had been made by him;[1] in which case we have seen that the sale would be valid.[2] A sale by a receipter, with the assent of the attaching plaintiff, has the effect of dissolving the attachment.[3]

§ 370. The duties of the bailee are sufficiently apparent from what has been stated. He is bound to keep the property, and to return it on demand to the officer, and to take reasonable care of it while it is in his custody. He cannot be required to exercise more than ordinary care.[4] For any omission of duty in any of these particulars, he will be responsible to the officer. But this obligation to return the property to the officer is not in all cases absolute.[5] As has been before stated, it depends upon the officer's liability for the property, either to the plaintiff, the defendant, the owner of it, or a subsequent attaching creditor, who, by placing a second writ in the hands of the same officer who seized the goods in the first place, has succeeded in obtaining a valid lien on the property. If the officer is not accountable for the goods to any one, he cannot make the bailee accountable to him. When we come to consider the bailee's defences against an action by the officer on the receipt, we shall see more particularly what facts discharge his liability.

§ 371. The remedies of an officer for a disturbance of his possession of attached property are not confined to his retaking the property; for that would frequently be impracticable. As his special property continues as long as the attachment exists, he may maintain trover,[6] trespass,[7] and replevin,[8] for any violation of his possession during that period. And this, as well where the property has been bailed, as where it remains in his own hands; for, though he have not the actual keeping of the goods, yet the

[1] Clark *v.* Morse, 10 New Hamp. 236.
[2] Denny *v.* Willard, 11 Pick. 519; Robinson *v.* Mansfield, 13 Ibid. 139.
[3] Eldridge *v.* Lancy, 17 Pick. 352.
[4] Cross *v.* Brown, 41 New Hamp. 283.
[5] Story on Bailments, § 132.
[6] Ludden *v.* Leavitt, 9 Mass. 104; Badlam *v.* Tucker, 1 Pick. 389; Lowry *v.* Walker, 5 Vermont, 181; Lathrop *v.* Blake, 3 Foster, 46.
[7] Brownell *v.* Manchester, 1 Pick. 232; Badlam *v.* Tucker, Ibid. 389; Walker *v.* Foxcroft, 2 Maine, 270; Strout *v.* Bradbury, 5 Ibid. 313; Whitney *v.* Ladd, 10 Vermont, 165.
[8] Perley *v.* Foster, 9 Mass. 112; Gordon *v.* Jenney, 16 Ibid. 465.

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custody of the bailee being that of his servant or agent, and his special property being still in existence, he is regarded as having the lawful possession, so as to enable him to maintain an action for it.[1] It has been held, indeed, in Massachusetts, that the officer must sue for bailed property, and not the bailee;[2] but, as we have just seen, the weight of authority is decidedly against that view of the subject.

§ 372. Where a bailee fails to redeliver property according to the terms of his contract, the officer may retake it, if accessible; but no case has met my observation in which it was held that he is under obligation to do so; except one in Maine, where it was held, that the plaintiff's approval of the receipter's ability, did not exonerate the officer from making effort to find the property to respond to execution, or from the duty of bringing a suit on the receipt.[3] His right of action on the receipt accrues upon his demanding the property from the bailee, and the failure of the latter to deliver it.[4] In cases where the bailment is created by a deputy, his principal may claim to have made the bailment himself, and may sustain an action in his own name upon the receipt;[5] or the deputy may sue thereon;[6] but it is not in virtue of his office, but of the personal contract between him and the bailee, that the deputy is enabled to maintain the action.[7] If the attachment was made by a person specially authorized to serve the writ, and a receipt given to him, an action on the receipt may be maintained in his name, after demand made upon the receipter, by an officer holding the execution in the case.[8] It is not necessary, in order to the officer's maintaining an action on the receipt, that he should be still in office; but if, after his going out of office, the property be legally demanded of him by another officer, so as to make him liable for it, he may demand it of the bailee, and maintain an action on the receipt.[9]

§ 373. As in other cases of mere deposit, no right of action

[1] Brownell *v.* Manchester, 1 Pick. 232. [2] Ludden *v.* Leavitt, 9 Mass. 104.
[3] Allen *v.* Doyle, 33 Maine, 420.
[4] Page *v.* Thrall, 11 Vermont, 230; Scott *v.* Whittemore, 7 Foster, 309.
[5] Davis *v.* Miller, 1 Vermont, 9; Baker *v.* Fuller, 21 Pick. 318; Smith *v.* Wadleigh, 18 Maine, 95.
[6] Spencer *v.* Williams, 2 Vermont, 209.
[7] Hutchinson *v.* Parkhurst, 1 Aikens, 258.
[8] Maxfield *v.* Scott, 17 Vermont, 634. [9] Bradbury *v.* Taylor, 8 Maine, 130.

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accrues to the bailor, until after a demand made upon the bailee, and a failure by him to return the goods; unless there has been a wrongful conversion, or some loss by gross negligence on his part.[1] The necessity for a demand is not dispensed with by proving the receipter's inability to redeliver;[2] but in such case the necessity for a demand at any particular place is dispensed with; it may be made wherever the officer finds the receipter.[3] The bailee's liability is not fixed instantly on demand, but he is entitled to a reasonable time after demand to deliver the goods, and an action will not lie on the receipt, until there has been a neglect, after reasonable time, to comply.[4] If the bailee has suffered the property to go back into the defendant's possession, no demand is necessary.[5] And it was held, that a demand was not necessary, where the tenor of the receipter's obligation was, that he should pay a sum of money, or keep the property safely, and redeliver it on demand; and, if no demand be made, that he should redeliver it within thirty days after rendition of judgment in the suit, at a place named, and notify the officer of the delivery.[6] It is not requisite that the demand be made by the officer who delivered the property to the bailee. The terms of the receipt are to be taken with reference to the subject-matter, and only import that the bailee holds the property in subjection to the attachment. Any officer, therefore, holding the execution in the case, sufficiently represents the bailor, to make the demand, and a delivery to such officer would be in effect a delivery to the bailor.[7] But a return on the execution that the officer had demanded of the receipter a delivery of the property, is no evidence of a demand.[8] But if another than the attaching officer make the demand, he must make known his authority to do so, or the demand and refusal will not be considered as evidence of a conversion.[9]

[1] Story on Bailments, § 107.

[2] Bicknell *v.* Hill, 33 Maine, 297.

[3] Gilmore *v.* McNeil, 46 Maine, 532.

[4] Jameson *v.* Ware, 6 Vermont, 610; Gilmore *v.* McNeil, 46 Maine, 532.

[5] Webster *v.* Coffin, 14 Mass. 196.

[6] Shaw *v.* Laughton, 20 Maine, 266; Humphreys *v.* Cobb, 22 Ibid. 380; Wentworth *v.* Leonard, 4 Cushing, 414; Hodskin *v.* Cox, 7 Ibid. 471.

[7] Davis *v.* Miller, 1 Vermont, 9; Stewart *v.* Platts, 20 New Hamp. 476; Cross *v.* Brown, 41 Ibid 283.

[8] Bicknell *v.* Hill, 33 Maine, 297.

[9] Walbridge *v.* Smith, Brayton, 173. In Phelps *v.* Gilchrist, 8 Foster, 266, BELL, J., said: "The receipter is not bound, by law, or by his contract, to deliver the property to any deputy sheriff or other officer who may demand it. He is not bound to

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§ 374. In the New England States, an attachment continues in force from the time of the levy until a certain period — in most, thirty days, in Connecticut, sixty days — after judgment in favor of the plaintiff. If, within the specified period after the judgment, the plaintiff do not cause execution to be issued, and levied on the attached property, if accessible, or, if not accessible, to have it demanded, within that time, of the officer who attached it, by the officer having the execution, the lien of the attachment is lost.[1] If the execution be, within that time, placed in the hands of the officer who made the attachment, he being still in office, that will be sufficient notice to him that the plaintiff claims to have the attached goods applied to satisfy the execution. When the execution is placed in the hands of another officer, it is necessary that within that time demand should be made upon the attaching officer for the goods, in order to hold him liable for them.[2] It was attempted to extend this rule to the receipter, and to hold him discharged, unless a demand for the goods was made upon him within the designated period after the judgment; but it was held, that if the officer's responsibility for the goods was fixed, so as to give him a right to demand them of the receipter, the demand upon the latter might be made at any time before suit brought upon his receipt.[3] In Vermont, however, it is required that the demand shall be made within the life of the execution.[4]

§ 375. Care should be taken that the execution under which the demand is made of the bailee should be regular; for it seems he is at liberty to inquire into that fact, and, where the action is against him for failing to deliver the property to be levied on to

take notice of the authority of other officers to have possession of it, until it is distinctly made known to him. He has a right to be satisfied that the stranger, who comes to him to demand the goods, has a legal right to make the demand, so that a delivery to him will discharge his obligations upon his receipt. Any such stranger who comes to him and calls for a delivery of the property, without making known the authority he has to receive it, may be treated as a person without authority. The duty of making known his authority is on him who assumes to make a claim under it. The party who is called upon is under no duty to inquire whether he has authority or not."

[1] Howard *v.* Smith, 12 Pick. 202; Collins *v.* Smith, 16 Vermont, 9; Pearsons *v.* Tincker, 36 Maine, 384; Wetherell *v.* Hughes, 45 Ibid. 61.

[2] Humphreys *v.* Cobb, 22 Maine, 380; Ayer *v.* Jameson, 9 Vermont, 363; Collins *v.* Smith, 16 Ibid. 9.

[3] Webster *v.* Coffin, 14 Mass. 196; Colwell *v.* Richards, 9 Gray, 374.

[4] Bliss *v.* Stevens, 4 Vermont, 88; Allen *v.* Carty, 19 Ibid. 65. The Supreme Court of this State once held that the demand must be made within thirty days after judgment. Strong *v.* Hoyt, 2 Tyler, 208.

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satisfy an irregular execution, he may take advantage of the irregularity to defeat the action. Thus, where an execution was placed in an officer's hands, returnable within sixty days, when by law it should have been returnable within one hundred and twenty days, and the officer, having demanded the goods of the bailee, brought suit on the receipt, alleging a demand *that the execution might be levied on the goods*, the declaration was, on demurrer, adjudged insufficient, because the execution was irregular, and the plaintiff had lost his claim on the goods by failing to take out a regular execution.[1]

§ 376. It does not appear that a personal demand upon the receipter is necessary. If it were, it would be in his power to elude it, and thus avoid his responsibility. It is held, that one who makes a contract to deliver specific articles on demand, should be always ready at his dwelling-house or place of business. A demand upon him personally, for goods which he could not carry about him, it is considered would be liable to more reasonable objection than a demand at his abode, during his absence; and, therefore, where a receipter was absent from the State, it was determined that a demand made at his dwelling-house, of his wife, was sufficient.[2]

[1] Jameson *v.* Paddock, 14 Vermont, 491.

[2] Mason *v.* Briggs, 16 Mass. 453. *Sed contra*, Phelps *v.* Gilchrist, 8 Foster, 266; where the Superior Court of New Hampshire take the opposite ground, and say: "A demand for these purposes is in its nature personal. It is a call by a person authorized to receive property, for its delivery, made upon the person who is bound to make such delivery. It must be such that the person required to deliver the property may at once discharge himself by yielding to the claim and giving up the property. Leaving a notice at a party's house is not of such a character. It gives no opportunity for the party to do what is demanded, and it would be a sufficient answer for the defendant to make in such a case, that though he was notified to give up the property, no opportunity was afforded him to comply with the notice. No reasonable construction can hold a receipter bound to deliver the property at any time and at any place where he may happen to be, and still less at any place where, after a demand left at his house, he may happen to be able to find the attaching officer, or his agent. It forms no part of the contract of a depositary, a bailee to keep property without compensation, to carry the property to the depositor, in order to return it. It is entirely sufficient, that, having kept the property according to his contract in some reasonable and suitable place, he is there ready to deliver it. If a demand is made at any other place, the bailee is entitled to have reasonable time and opportunity to make the delivery at that place, and to require the party who calls for the property to be there to receive it. Any mode of making the demand which precludes the party from availing himself of these rights, is clearly insufficient, and therefore the leaving a written demand at a receipter's house, is not evidence either of a breach of the receipter's contract, or of a conversion of the property." See Gilmore *v.* McNeil, 46 Maine, 532.

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§ 377. It has been held in New Hampshire, that merely proving a demand upon the bailee for the goods, without bringing to his knowledge that they are demanded for the purpose of being subjected to execution in the case in which they were attached, does not establish a conversion by the bailee. The court say: "The receipter is in no default, unless it appears that the object of the demand is brought at the time to his notice; which by no means necessarily results from the delivery of a written notice. A great variety of circumstances may exist, which would prevent such a communication from being at once attended to. No inference is to be drawn against a man from his silence or inaction, unless it appears that he was aware of what was said or done to affect his interest. The burden is upon the party who relies upon such evidence, to establish the fact that the party against whom he desires an inference to be drawn, knew and understood at the time the facts necessary to justify such inference."[1]

§ 377 *a*. Where one becomes a receipter for property attached in several cases, a demand upon him for the property in one of those cases is sufficient to fix his liability in all of them, if judgment and execution shall have been obtained in them, so as to make the officer liable for the forthcoming of the property on execution.[2]

§ 378. Where several persons jointly become receipters, a demand of the goods from any one of them is sufficient.[3] In such a case, where it was agreed "that a demand on any one of them should be binding on the whole," and one of them indorsed on the receipt an acknowledgment that "a due and legal demand" had been made on him by the officer, it was considered doubtful whether such an admission was conclusive upon the other receipters.[4]

§ 379. Trover or replevin will lie against a receipter, upon his refusal or neglect to comply with a demand for the delivery of the property;[5] but assumpsit seems to be quite as much resorted to in

[1] Phelps *v.* Gilchrist, 8 Foster, 266. [2] Hinckley *v.* Bridgham, 46 Maine, 450.
[3] Griswold *v.* Plumb, 13 Mass. 298.
[4] Fowles *v.* Pindar, 19 Maine, 420.
[5] Bissell *v.* Huntington, 2 New Hamp. 142; Cargill *v.* Webb, 10 Ibid. 199; Webb *v.* Steele, 13 Ibid. 230; Sibley *v.* Story, 8 Vermont, 15; Pettes *v.* Marsh, 15 Ibid. 454; Dezell *v.* Odell, 3 Hill (N. Y.), 215; Stevens *v.* Eames, 2 Foster, 568.

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such cases. Trespass will not lie.[1] Where the officer who created the bailment lays a second attachment on the property, while in the bailee's hands, as we have seen he may do, he may sustain the action, in virtue of such second attachment, though that under which the property was bailed may have been dissolved.[2]

§ 380. An acknowledgment by the bailee of a demand upon him by the officer, is sufficient evidence of a refusal to deliver the goods, without an accompanying admission of such refusal.[3] The delivery of goods by the bailee to another person under an adverse claim of title, or a conveyance thereof by mortgage to pay his own debts, is equivalent to a conversion.[4] But if the conversion be with the knowledge and assent of the officer, he cannot afterwards hold the receipter liable on his contract.[5]

§ 381. The defences of which the bailee may or may not avail himself, in an action on his receipt, next claim attention. It is not competent for him to show that the officer who levied the attachment was not legally qualified to act as such, if he was fully in the exercise of the office *de facto*;[6] nor can he set up that the goods were not attached, as stated in the receipt, though the fact be that the attachment was a nominal one, and that the officer never did actually seize them;[7] nor can he deny that the goods were delivered to him by the officer;[8] nor can he impeach the judgment in the attachment suit,[9] or show informality or irregularity in the attachment.[10] An amendment made by the plaintiff in the action in which the property was attached, but which did not tend to increase the liability of the defendant, will not discharge the receipter from his accountability;[11] but where, after an

[1] Woodbury, J., in Sinclair *v.* Tarbox, 2 New Hamp. 135.
[2] Whittier *v.* Smith, 11 Mass. 211; Whitney *v.* Farwell, 10 New Hamp. 9.
[3] Cargill *v.* Webb, 10 New Hamp. 199.
[4] Baker *v.* Fuller, 21 Pick. 318; Stevens *v.* Eames, 2 Foster, 568.
[5] Stevens *v.* Eames, 2 Foster, 568.
[6] Taylor *v.* Nichols, 19 Vermont, 104.
[7] Jewett *v.* Torrey, 11 Mass. 219; Lyman *v.* Lyman, Ibid. 317; Morrison *v.* Blodgett, 8 New Hamp. 238; Spencer *v.* Williams, 2 Vermont, 209; Lowry *v.* Cady, 4 Ibid. 504; Allen *v.* Butler, 9 Ibid. 122; Phillips *v.* Hall, 8 Wendell, 610; Webb *v.* Steele, 13 New Hamp. 230; Howes *v.* Spicer, 23 Vermont, 508.
[8] Spencer *v.* Williams, 2 Vermont, 209; Allen *v.* Butler, 9 Ibid. 122.
[9] Brown *v.* Atwell, 31 Maine, 351.
[10] Drew *v.* Livermore, 40 Maine, 266.
[11] Smith *v* Brown, 14 New Hamp. 67; Miller *v.* Clark, 8 Pick. 412; Laighton *v* Lord, 9 Foster, 237

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attachment, an additional plaintiff was introduced into the suit, it was held that, as the officer could not be made liable for the property to the plaintiff so brought in, he could not maintain an action on the receipt.[1] A discharge of the defendant in bankruptcy, after judgment against him in the attachment suit, will not discharge the bailee;[2] even if the petition in bankruptcy was filed before judgment was rendered;[3] nor the commitment of the debtor on execution, after demand made on the receipter for the goods, and his failure to deliver them, though the plaintiff bring suit and recover judgment against the debtor and his surety, for an escape, on a bond given by them for the prison limits;[4] nor will the fact that the defendant has an execution against the plaintiff for a larger amount than that under which the goods are demanded;[5] nor will an agreement between the plaintiff and the defendant in the attachment suit, that the former shall not enforce the receipt, and a forbearance accordingly to enforce it;[6] nor will the fact that after failing to comply with the demand of the officer within a proper time, the bailee at a subsequent time showed the officer the property, and told him to take it.[7]

The question has arisen, whether a bailee can set up as a defence to an action on his receipt, that the property was not by law subject to attachment; and it has been held to depend upon the officer's liability to the defendant for a return of the property to him. If he is so liable, the bailee cannot make such a defence;[8] but if the bailee gave the property back into the possession of the defendant, the officer is no longer liable to the latter for it, and the bailee may discharge his liability to him by showing that the property was exempt by law from attachment.[9]

§ 382. If an officer, after having delivered property to a receipter, seize it under another attachment, and take it out of the custody of the receipter, this puts an end to the contract of bailment, and the officer cannot recover on the receipt.[10] But if the

[1] Moulton *v.* Chapin, 28 Maine, 505. [2] Smith *v.* Brown, 14 New Hamp. 67.
[3] Towle *v.* Robinson, 15 New Hamp. 408; Lamprey *v.* Leavitt, 20 Ibid. 544.
[4] Twining *v.* Foot, 5 Cushing, 512.
[5] Jenney *v.* Rodman, 16 Mass. 464.
[6] Ives *v.* Hamlin, 5 Cushing, 534.
[7] Scott *v.* Whittemore, 7 Foster, 309; Hill *v.* Wiggin, 11 Ibid. 292.
[8] Smith *v.* Cudworth, 24 Pick. 196.
[9] Thayer *v.* Hunt, 2 Allen, 449.
[10] Beach *v.* Abbott, 4 Vermont, 605; Rood *v.* Scott, 5 Ibid. 263.

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bailee himself, after the bailment, levy an attachment on the goods and sell them, this is no defence to the action on his receipt, nor can it be set up in mitigation of damages.[1] Where, however, before the bailment, the property had been attached in another suit against the same defendant, and upon the execution in that case had been seized and sold, the bailee delivering it to the officer for that purpose, it was held, that as the first attaching officer had a better title to it than the second, the latter could not maintain an action on the receipt taken by him. And it was considered to be immaterial whether the first attachment was fraudulent or not, if the bailee was not a party to the fraud; or whether the bailee had notice or not that the plaintiff in the suit in which he became bailee, intended to contest the first attachment on the ground of fraud.[2]

§ 383. Where a receipt for attached property bound the makers to return the property, or, at their choice, to pay the officer certain sums, when called for, after judgment should be recovered on the demands on which the property was attached, and it was shown that soon after the execution of the receipt the property was sold by the officer, with the consent of the plaintiff, defendant, and receipter, and the money paid into the hands of the receipter; it was held, that the sale was an implied rescinding of the contract, and that the officer could neither maintain trover for the property, nor assumpsit upon the receipt for the money.[3]

§ 384. A dissolution of the attachment, and a subsequent delivery of bailed property by the bailee to the person entitled to it, discharge the bailee from liability to the officer. Therefore, where, under the insolvent law of Massachusetts, an assignment by an insolvent is declared to vest all his property in the assignees, "although the same may be attached on *mesne* process as the property of said debtor; and such assignment shall be effectual to pass all the said estate, and dissolve any such attachment"; and a defendant, after an attachment and bailment of his property, made an assignment in insolvency, and after the assignment the bailee delivered the property over to the assignees; it was held, that he was not liable on his receipt.[4]

[1] Whittier *v.* Smith, 11 Mass. 211. [2] Webster *v.* Harper, 7 New Hamp. 594.
[3] Kelly *v.* Dexter, 15 Vermont, 310.
[4] Sprague *v.* Wheatland, 3 Metcalf, 416; Butterfield *v.* Converse, 10 Cushing, 317.

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§ 385. Where a horse was attached and delivered to a bailee, and before the expiration of the time limited for its delivery it died, without any fault of the bailee, he was held not to be answerable for its value.[1] In such case no fault on his part is to be presumed. The presumption is the other way; and if it is sought to charge him for fault, such fault must be proved.[2] But where the bailee permitted the horse to be sold by the defendant to a third person, who took the same into his possession, and the horse then died, its death was held to be no defence to an action on the bailee's receipt.[3]

§ 386. An officer is not bound to accept from a receipter a different article from that attached, though it be of the same description, quality, and quantity.[4] And if a receipter, when the attached property is demanded of him by the officer, deliver to him other like property, which is sold by the officer, and being insufficient, the officer sue him on the receipt, it is no defence for the receipter to say that the property delivered was in lieu of that attached, unless the officer expressly agreed it should be so received. In such case it is the duty of the bailee to redeliver the same property he had received, or pay the value of it. If he substituted other property, which was sold on the execution, he would be liable still for the property attached; but the proceeds of that sold would extinguish that liability *pro tanto*.[5]

§ 387. Where a partnership gave a receipt for property which had been attached on a writ against a former partnership, composed in part of the same persons, the debts of which the receipters, as successors of the former firm had agreed to pay, the receipters, when sued on the receipt, were not allowed to contest its validity on the ground that the property of the new partnership was not liable to attachment upon a demand against the old firm.[6]

§ 388. We have seen that the right of the officer to retake

[1] Shaw *v.* Laughton, 20 Maine, 266.
[2] Cross *v.* Brown, 41 New Hamp. 283.
[3] Thayer *v.* Hunt, 2 Allen, 449.
[4] Scott *v.* Whittemore, 7 Foster, 309; Anthony *v.* Comstock, 1 Rhode Island, 454; Gilmore *v.* McNeil, 46 Maine, 532.
[5] Sewell *v.* Sowles, 13 Vermont, 171; Smith *v.* Mitchell, 31 Maine, 287.
[6] Morrison *v.* Blodgett, 8 New Hamp. 238.

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bailed property from the possession of the bailee depends on his liability therefor, either to the plaintiff, the defendant, or another creditor of the defendant, who has, through the same officer, laid a second attachment on the property, while it was still in the bailee's possession. The same rule applies where the officer sues on the receipt. The law recognizes the bailee's right to permit the property to go back into the defendant's possession; and where he does so, considers his receipt, in effect, as a contract to pay the demand upon which the property was attached;[1] and it is, therefore, well settled that, in such case, the bailee's liability to the officer, where there is only one attachment, depends altogether upon the officer's liability to the plaintiff; and that, if the officer be no longer liable to the plaintiff, he cannot maintain an action on the receipt.[2] And where the officer, no longer liable to either plaintiff or defendant in the action in which the bailment was created, seeks to enforce the receipt for the benefit of a second attaching creditor, it is a sufficient defence, that, before the second attachment was made, the property had gone into the defendant's possession, and that the first attachment was satisfied before the officer demanded the property of the bailee.[3]

§ 389. If an officer attach property as being the defendant's, he may notwithstanding show, in an action by the plaintiff against him for not having it in hand to satisfy the execution in the case, that it did not in fact belong to the defendant.[4] This proceeds from the obvious principle, that the officer shall not be responsible to the plaintiff for not doing that which he was under no legal obligation to do; and as he is under no obligation to keep the property of one man to answer the debt of another, he cannot be made liable for not doing so. If, then, in such a case the property has been bailed, it being, as we have seen, a well-settled principle that the bailee's liability to the officer depends upon the officer's accountability for the property to some one else, it follows, that, where the property is not the defendant's, the officer should not

[1] Whitney *v.* Farwell, 10 New Hamp. 9.

[2] Fisher *v.* Bartlett, 8 Maine, 122; Carr *v.* Farley, 12 Ibid. 328; Sawyer *v.* Mason, 19 Ibid. 49; Moulton *v.* Chapin, 28 Ibid. 505; Lowry *v.* Stevens, 8 Vermont, 113; Jameson *v.* Paddock, 14 Ibid. 491; Frost *v.* Kellogg, 23 Ibid. 308.

[3] Whitney *v.* Farwell, 10 New Hamp. 9; Hill *v.* Wiggin, 11 Foster, 292.

[4] Fuller *v.* Holden, 4 Mass. 498; Denny *v.* Willard, 11 Pick. 519; Canada *v.* Southwick, 16 Ibid. 556; Dewey *v.* Field, 4 Metcalf, 381; Sawyer *v.* Mason, 19 Maine, 49; Burt *v.* Perkins, 9 Gray, 317.

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be allowed to hold the receipter answerable for it, if it has gone into the possession of the rightful owner. The mere fact that, at the time of the attachment, the property did not belong to the defendant, will not, of itself, be a sufficient defence against the bailee's liability on his receipt; for the officer, being liable to the true owner, must obtain possession of the property in order to restore it.[1] But where it appears not only that the property belonged, but has been delivered, to a third person, it is unquestionable that the officer cannot maintain an action against the bailee for it.[2] In Louisiana, it would seem not to be necessary to show that the property had gone back into the hands of the actual owner, if it was in the hands of those who were entitled to the possession of it; as where it was consigned by the owner to commission merchants, and the latter took it from the possession of the officer, upon executing a bond to return it; there, the commission merchants being entitled to retain their possession, which was in legal contemplation the possession of the owner, would not be required to show that the owner had the actual custody of the property.[3]

§ 390. Where, however, in a receipt which admitted the property to have been attached as the defendant's, the following clause was embodied — "and we further agree that this receipt shall be conclusive evidence against us as to our receipt of said property, its value before mentioned, and our liability under all circumstances to said officer for the full sum above mentioned" — it was held, that the receipters would not be allowed to avoid their liability, by proving that the property was not the defendant's.[4]

§ 391. Another important question here arises, — how far is the receipter estopped by his receipt from asserting property in himself in the goods attached, when they belong to him? This depends upon the circumstances under which he undertakes to assert it. If sued by the defendant for a return of the goods,

[1] Fisher v. Bartlett, 8 Maine, 122; Scott v. Whittemore, 7 Foster, 309; Clark v. Gaylord, 24 Conn. 484.

[2] Learned v. Bryant, 13 Mass. 224; Fisher v. Bartlett, 8 Maine, 122; Sawyer v. Mason, 19 Ibid. 49; Stanley v. Drinkwater, 43 Ibid. 468; Quine v. Mayes, 2 Robinson (La.), 510; Lathrop v. Cook, 14 Maine, 414; Scott v. Whittemore, 7 Foster, 309; Clark v. Gaylord, 24 Conn. 434; Burt v. Perkins, 9 Gray, 317.

[3] Quine v. Mayes, 2 Robinson (La.), 510.

[4] Penobscot Boom Corporation v. Wilkins, 27 Maine, 345.

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after dissolution of the attachment, his receipt does not conclude him from showing that they belonged to himself, and not to the defendant.[1] If the receipter, after having delivered up the property according to his contract, bring replevin against the officer for it, he is not estopped from maintaining the action, by reason of having given the receipt, and therein having acknowledged that the articles attached were the property of the defendant; for the engagement was performed, and the estoppel could not be permitted to extend beyond the terms and duration of the contract.[2]

§ 392. But as between him and the officer, in an action by the latter on the receipt, where the receipt admits the goods to be the defendant's, or to have been attached as his, it has been repeatedly held, that the bailee is estopped by the receipt from setting up property in himself.[3] And in New York, it was so ruled in a case where the receipt contained no such admission, but simply an acknowledgment of having received the property, and a promise to redeliver it at a certain time and place.[4] Later cases, however, qualify this general rule. While it is conceded on all hands that a receipter who conceals from the officer his ownership of the property, and suffers it to be attached as the defendant's, thereby preventing the officer, perhaps, from attaching other property, is precluded, when sued on the receipt, from setting up property in himself; yet it is considered to be materially different where he makes known to the officer, at the time of the attachment, that the property is his, and not the defendant's. In such case it is held in Massachusetts, that the bailee may set up property in himself, not as a bar to the action, but as showing the officer entitled only to nominal damages;[5] while in Vermont and in California it is considered to constitute a full defence.[6] And in New Hampshire it was held, that the giving of a receipt for the property by the

[1] Barron v. Cobleigh, 11 New Hamp. 557.

[2] Johns v. Church, 12 Pick. 557; Lathrop v. Cook, 14 Maine, 414.

[3] Johns v. Church, 12 Pick. 557; Robinson v. Mansfield, 13 Ibid. 139; Bursley v. Hamilton, 15 Ibid. 40; Dewey v. Field, 4 Metcalf, 381; Sawyer v. Mason, 19 Maine, 49; Penobscot Boom Corporation v. Wilkins, 27 Ibid. 345; Barron v. Cobleigh, 11 New Hamp. 557; Drew v. Livermore, 40 Maine, 266.

[4] Dezeil v. Odell, 3 Hill (N. Y.), 215.

[5] Bursley v. Hamilton, 15 Pick. 40.

[6] Adams v. Fox, 17 Vermont, 361; Bleven v. Freer, 10 California, 172. See Jones v. Gilbert, 13 Conn. 507.

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owner of it, is no bar to an action of trespass by him against the attaching officer.[1]

§ 393. The only remaining topic of consideration, in this connection, is the measure of the officer's recovery in the action against the bailee. Whether he shall recover only nominal damages, or the full value of the property, or the amount of the plaintiff's demand, not exceeding the value of the property, is to be determined by the facts of each case. Where, at the institution of his suit, he has a full right of action against the receipter, but afterward, and before obtaining judgment, he is, by the plaintiff's failure to take the needful steps, released from responsibility to him, and at the same time the property has gone back into the defendant's possession; as he is no longer liable to either plaintiff or defendant, he can recover only nominal damages against the receipter.[2]

§ 394. Where the value of the property is stated in the receipt, it is not to be considered as descriptive of the property, but as a part of the contract, and as constituting a stipulation for a rule of damages against the receipter in case of a non-delivery of the property; and hence an officer will not be allowed in an action on the receipt, whether in form *ex contractu* or *ex delicto*, to give evidence that the property was of greater value than that stated in the receipt;[3] and of course the receipter cannot give evidence that it was of less value.[4] In such case, where all the articles are valued at a gross sum, the receipter cannot avoid his liability, *pro tanto*, by tendering to the officer part of the goods, unless he has a reasonable excuse for not delivering the residue.[5] But if the value of each article is separately stated in the receipt, and the bailee tenders part of them to the officer, the latter can recover only for the articles not tendered, according to their admitted value.[6]

[1] Morse *v.* Hurd, 17 New Hamp. 246.

[2] Norris *v.* Bridgham, 14 Maine, 429; Moulton *v.* Chapin, 28 Ibid. 505; Farnham *v.* Cram, 15 Ibid. 79.

[3] Parsons *v.* Strong, 13 Vermont, 235; Drown *v.* Smith, 3 New Hamp. 299; Remick *v.* Atkinson, 11 Ibid. 256; Jones *v.* Gilbert, 13 Conn. 507.

[4] Smith *v.* Mitchell, 31 Maine, 287.

[5] Drown *v.* Smith, 3 New Hamp. 299; Remick *v.* Atkinson, 11 Ibid. 256.

[6] Remick *v.* Atkinson, 11 New Hamp. 256.

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§ 395. Whether the officer can recover the full value of the property, depends upon his being liable to that extent for it to some one else. If the amount of the judgment in the attachment suit be greater than the value of the property, then the measure of the recovery is the value of the property.[1] If it has gone back to the defendant's possession, and its value exceeded the amount of the judgment in the attachment suit, the rule of damages is the amount of the judgment and costs;[2] but if the amount of the attachments upon it is less than the value stipulated, the recovery cannot be for a greater amount than that necessary to satisfy the attachments.[3] But where the bailee has converted the property to his own use, or still holds it, the officer is not only authorized, but obliged, to take judgment for the full value; and if he take it for less, he will be liable to the defendant for the deficiency.[4]

§ 396. The judgment which an officer may recover against a receipter is merely collateral to the debt due from the defendant to the plaintiff in the attachment, and for the benefit and security of the officer; and when the defendant has no claim on him, and his obligation to the plaintiff is removed, by the payment of the debt for which the attachment issued, the judgment becomes a mere dead letter, and cannot be enforced.[5] But if the debt be satisfied *after* the officer has sued on the receipt, that will not bar his action, but he will still be entitled to recover nominal damages.[6]

[1] Cross *v.* Brown, 41 New Hamp. 283.
[2] Cross *v.* Brown, 41 New Hamp. 283.
[3] Farnham *v.* Cram, 15 Maine, 79.
[4] Bissell *v.* Huntington, 2 New Hamp. 142; Whitney *v.* Farwell, 10 Ibid. 9; Sawyer *v.* Mason, 19 Maine, 49; Catlin *v.* Lowrey, 1 D. Chipman, 396.
[5] Paddock *v.* Palmer, 19 Vermont, 581; Brown *v.* Crockett, 22 Maine, 537.
[6] Stewart *v.* Platts, 20 New Hamp. 476.

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CHAPTER XV.

ATTACHMENTS IMPROVIDENTLY ISSUED, AND THE MEANS OF DEFEATING THEM.

§ 397. ISSUING an attachment improvidently, is to be distinguished from issuing it irregularly. In the latter case, the defect appears upon the face of the proceedings, and may be taken advantage of by a motion to quash or dissolve. In the former, all the preliminary steps may be regular, and yet the attachment have been improvidently granted, because the allegations on which it issued were untrue. Such is the difference between these two classes of cases.[1]

§ 398. Where, as in the New England States, under the ordi-

[1] In Lovier *v.* Gilpin, 6 Dana, 321, the Court of Appeals of Kentucky use the following language: "Upon the face of the record of this attachment, that is, upon the face of the bond and attachment itself, there can be no question, nor is any made, as to its having been issued by the proper justice, in the proper county, and in a proper case, so far as the case is to be made out to the justice, in order to authorize the emanation of the process, or so far as it is to be stated in the process itself, in order to show its validity. In issuing the attachment, therefore, the justice has complied with every requisition of the law, and upon the face of the record there is no want of jurisdiction to issue process in the case; no misjudgment in deciding upon the facts necessary to authorize the process; no excess of jurisdiction, either in the nature of the process issued, or in issuing it in a case in which the law does not authorize such process to be sued out. For the justice is not made the judge of the facts, nor is he to inquire into them, except as they are presented in the statement of the applicant for the writ, and as thus presented they are sufficient. . . . . The authority of the justice does not depend in any degree upon the truth of the statement made by the applicant, and on the ground of which the attachment issues, but upon the sufficiency of the statement itself when compared with the law. To prove the falsity of a statement which is sufficient in itself, does not, therefore, disprove the authority or jurisdiction of the justice, nor prove nor make the process void for want of authority. Such proof makes out a case of process unduly or improperly issued, not on the ground of want of authority in the officer to issue it, but on the ground that the statement which gave the authority in the particular case is untrue as to a fact, which, if truly stated, would have shown that there was no authority in the particular case. Such proof might perhaps be sufficient, in a direct proceeding for the purpose, to authorize the annulment or vacation of the process; it would certainly be sufficient to abate the attachment on proper pleading. But until it is set aside, or in some manner annulled, it remains a part of the record of the proceeding,—*functus officio*, it is true, but unaffected by the extraneous matter, and being perfect and regular in itself, and still showing on its face that it was issued by legal authority, it is, therefore, still sufficient to justify the immediate acts which it commanded, though not tending to justify the illegal act of obtaining it upon a false statement, or the actual injury consequent upon that act."

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nary process of summons an attachment may be made, if the plaintiff so directs, it is of no importance to the defendant to be allowed to impeach the attachment for improvidence; but where, as elsewhere is universally the case, an affidavit alleging certain facts is required, to authorize an attachment to issue, this privilege is of great value to defendants, who might otherwise be remedilessly ruined by the recklessness or bad faith of creditors; and it is in many States secured to them by statute.

§ 399. There can hardly be room for doubt that, without the aid of express statutory provision, a defendant may, in one form or another, contest the truth of the grounds alleged by the plaintiff for obtaining the attachment. In Mississippi,[1] Arkansas,[2] and Texas,[3] it is not so; but, as the following review will exhibit, this doctrine is upheld in New York, Pennsylvania, New Jersey, Maryland, South Carolina, Tennessee, Kentucky, Indiana, and Illinois. The modes by which the contest may be instituted are different, as will be seen in the succeeding sections, setting forth as well those used without, as those used with, statutory authority.

§ 400. In New York, prior to the adoption of the Code of Procedure, the mode of defeating an attachment improvidently issued, was by *supersedeas*, obtained from the Supreme Court, on affidavits filed by the defendant, showing the falsity of that on which the writ was obtained. That court, at an early day, asserted its jurisdiction in such cases,[4] and subsequently constantly exercised it. Therefore, where an attachment was obtained on an allegation that the defendant had departed the State, with the intent of avoiding arrest, and of defrauding his creditors, a *supersedeas* was awarded, upon the relation of the defendant, showing that he had not departed the State, but had openly made a journey within it.[5] So where, from the evidence given by the defendants, it ap-

[1] Smith *v.* Herring, 10 Smedes & Marshall, 518.

[2] Taylor *v.* Ricards, 9 Arkansas (4 English), 378; Mandel *v.* Peet, 18 Ibid. 236.

[3] Cloud *v.* Smith, 1 Texas, 611. In Alabama it was at one time held, that the allegations of the affidavit were traversable, and might be investigated and decided by a jury. Brown *v.* Massey, 3 Stewart, 226. This opinion, however, was afterwards in effect overruled, in Middlebrook *v.* Ames, 5 Stewart & Porter, 158. Subsequently, by statute, the defendant was precluded from contesting the truth of the affidavit; and though the statute referred only to original attachments, it was held, in Jones *v.* O'Donnell, 9 Alabama, 695, to apply as well to an ancillary attachment, taken out in, and in aid of, a suit already instituted by summons.

[4] Lenox *v.* Howland, 3 Caines, 323.

[5] *Ex parte* Chipman, 1 Wendell, 66.

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peared that they had not absconded, and were not concealed, at the time the petition for an attachment was presented.[1]

In this State, since the adoption of the Code of Procedure, the courts have asserted their inherent right to control their own process, and to inquire into the grounds upon which it has issued, and to receive proofs in relation thereto, on special motion, though the Code gives no authority for such a proceeding.[2]

On such a motion the defendant may introduce affidavits against, and the plaintiff supplemental affidavits in support of, the ground of attachment sworn to in the first instance; and if by all the affidavits sufficient appears to warrant the issuing of the attachment, the court will not set it aside for any insufficiency in the affidavit on which it issued.[3]

A motion to vacate an attachment because the ground upon which it was issued was not true, must, in that State, be made at the first opportunity, or an excuse be shown for not so making it. It comes too late after judgment.[4] But where it was made before judgment, and was referred by the court to a referee to hear the proofs, and report his opinion thereon, and before his report was made judgment was entered, it was held, that the motion might be heard and passed upon after the entry of the judgment.[5]

§ 401. In Pennsylvania, it was early held, that the court would make inquiry in attachment cases into the plaintiff's cause of action, as in cases of *capias*, and where a sufficient cause did not appear, would dissolve the attachment.[6] This right of inquiry in such cases is now firmly established in that State, and the practice has been regulated by several reported decisions.[7] It is the practice there, too, to allow the defendant in a domestic attachment, to show by affidavits, that he had not absconded, as alleged, and upon the same being satisfactorily shown, to dissolve the attach-

[1] Matter of Warner, 3 Wendell, 424.

[2] Morgan *v.* Avery, 7 Barbour, 656; Genin *v.* Tompkins, 12 Ibid. 265.

[3] Cammann *v.* Tompkins, 1 Code Reports, 12; St. Amant *v.* De Beixcedon, 3 Sanford Sup. Ct. 703.

[4] Lawrence *v.* Jones, 15 Abbott Pract. R. 110. See Foster *v.* Dryfus, 16 Indiana, 158.

[5] Thompson *v.* Culver, 15 Abbott Pract. R. 97; s. c. 38 Barbour, 442; 24 Howard Pract. R. 286.

[6] Vienne *v.* M'Carty, 1 Dallas, 165.

[7] Vienne *v.* M'Carty, 1 Dallas, 165, note *a*, and the cases there cited.

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ment. In a case of this description, the court said, "The affidavit on which a domestic attachment is grounded, has never been held to be conclusive; such a doctrine would be attended with the most pernicious consequences"; and intimated that the plaintiff might sustain his affidavit by contrary proofs to those presented by the defendant.[1]

§ 402. In New Jersey, the power and duty of the court to inquire into the misuse and abuse of this process, was declared to rest on the most ancient and established principles, and to be as applicable to writs of attachment as any other process. There the truth of the allegations on which the writ issues is brought up on motion to dissolve the attachment, sustained by affidavits.[2]

§ 403. In Maryland, it was decided, that every fact is cognizable by the court, which would show that the attachment issued improvidently; and evidence *dehors* the proceedings might be resorted to; and proof made to the court;[3] either under a motion to quash or under a plea.[4]

§ 404. In South Carolina, the defendant may contest the allegations in the affidavit, and if successful in disproving them, the attachment will be dissolved. As to the mode of accomplishing this, the decisions appear not to be quite consistent. In a case of domestic attachment, it was held, that "a shorthand method of quashing by motion" was inadmissible:[5] afterwards, in a case of foreign attachment, this course was allowed;[6] though in a subsequent case it was considered that, whatever may have been the practice, a judge ought, in a doubtful case, to refuse a motion to quash an attachment by an affidavit; and the propriety of a plea in abatement, and a trial of the issue by a jury, was recognized.[7]

[1] Boyes *v.* Coppinger, 1 Yeates, 277.
[2] Branson *v.* Shinn, 1 Green, 250; City Bank *v.* Merrit, Ibid. 131; Day *v.* Bennett, 3 Harrison, 287.
[3] Campbell *v.* Morris, 3 Harris & M'Henry, 535.
[4] Lambden *v.* Bowie, 2 Maryland, 334; Gover *v.* Barnes, 15 Ibid. 576.
[5] Havis *v.* Trapp, 2 Nott & M'Cord, 130.
[6] Wheeler *v.* Degnan, 2 Nott & M'Cord, 323.
[7] Shrewsbury *v.* Pearson, 1 M'Cord, 331.

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§ 405. In Tennessee,[1] Kentucky,[2] Indiana,[3] and Illinois,[4] it is held, that the defendant may plead in abatement, traversing the allegations of the affidavit.

§ 406. The preceding sections show the views of this subject entertained by the courts of the several States in which it has been considered, unconnected with statutory provisions. Before proceeding to refer to such provisions existing in other States, and the decisions thereunder, it should be remarked, that in whatever mode a contest of the truth of the affidavit may be allowed, it should precede the defendant's appearance and plea to the action. If he have already pleaded to the action, or do so at the same time that he pleads to the affidavit, or afterwards, he cannot controvert the affidavit.[5] And in no case will he be allowed to give evidence to contradict the affidavit, unless he have pleaded to it in abatement, where that is the mode of contesting it.[6] And in Illinois, applying the common law rule in regard to pleas in abatement, it was held, that this plea could not be filed after a continuance.[7]

§ 406 *a*. Where an attachment has been vacated by the court, after an inquiry into the merits of the ground upon which it was issued, another attachment by the same party, on the same ground, where no new facts are presented, cannot be sustained. "The defendant is not to be continually vexed by the same application; nor are the same or different tribunals to hear and decide upon the same matters more than once."[8]

§ 407. A plea in abatement, where allowed, must directly and fully negative the allegations of the affidavit. Thus, where the affidavit stated that the defendant "was removing and about to

[1] Harris *v.* Taylor, 3 Sneed, 536; Isaacks *v.* Edwards, 7 Humphreys, 465; Dunn *v.* Myres, 3 Yerger, 414.

[2] Meggs *v.* Shaffer, Hardin, 65; Moore *v.* Hawkins, 6 Dana, 289; Lovier *v.* Gilpin, Ibid. 321.

[3] Voorhees *v.* Hoagland, 6 Blackford, 232; Abbott *v.* Warriner, 7 Ibid. 573.

[4] Bates *v.* Jenkins, 1 Illinois (Breese), Appendix, 25.

[5] Meggs *v.* Shaffer, Hardin, 65; Lindsley *v.* Malone, 23 Penn. State, 24; Hatry *v.* Shuman, 13 Missouri, 547; Cannon *v.* McManus, 17 Ibid. 345; Collins *v.* Nichols, 7 Indiana, 447.

[6] Moore *v.* Hawkins, 6 Dana, 289.

[7] Archer *v.* Claflin, 31 Illinois, 306.

[8] Schlemmer *v.* Myerstein, 19 Howard Pract. R. 412.

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remove his property from the State," and the defendant pleaded that "he was not removing from the State, nor was he removing his property from the State," it was considered to be no answer to the affidavit, and demurrable.[1]

§ 408. In Louisiana, the Code of Practice provides that the defendant may prove in a summary way, after having given due notice in writing to the adverse party, that the allegations on which the order for attachment had been obtained, were false; in which case the attachment will be dissolved.[2] And it is not necessary that such a defence should be set up by plea or exception.[3] It is considered there, that the affidavit has a greater effect than merely enabling the party to obtain process against the defendant, and that in making proof under such a defence, the defendant must show sufficient to throw the burden of proof on the plaintiff;[4] and in a case where the evidence on behalf of the defendant effected no more than merely making the matter doubtful, it was held, that the attachment should not be dissolved.[5] In Ohio, however, it is held, that a denial by the defendant of the ground of attachment, throws the burden of proof on the plaintiff.[6]

§ 409. In Missouri, the right conferred upon the defendant by statute, to contest the truth of the plaintiff's affidavit, by a plea "in the nature of a plea in abatement," has given rise to a number of adjudications. The language of the statute is as follows: "In all cases where property or effects shall be attached, the defendant may file a plea, in the nature of a plea in abatement, without oath, putting in issue the truth of the facts alleged in the affidavit, on which the attachment was sued out. Upon such issue, the plaintiff shall be held to prove the existence of the facts alleged by him, as the ground of the attachment; and if the issue be found for him, the cause shall proceed; but if it be found for the defendant, the suit shall be dismissed at the costs

[1] White v. Wilson, 10 Illinois (5 Gilman), 21.
[2] Louisiana Code of Practice, Art. 258.
[3] Read v. Ware, 2 Louisiana Annual, 498.
[4] Brumgard v. Anderson, 16 Louisiana, 341; Offut v. Edwards, 9 Robinson (La.), 90; Simons v. Jacobs, 15 Louisiana Annual, 425.
[5] Moore v. Angiolette, 12 Martin, 532.
[6] Coston v. Paige, 9 Ohio State, 397.

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of the plaintiff."[1] In order to see the force of some of the cases to be cited from the Reports of this State, it is necessary to mention here, that the affidavit for an attachment must state that the affiant "has good reason to believe, and does believe" the facts alleged as a ground for obtaining the attachment. The plea authorized by the statute, being therein designated as "in the nature" of a plea in abatement, was at one time held to be in fact such a plea, and to be governed by the same principles, subject to the same rules, and liable to the same consequences as a plea in abatement;[2] and therefore not amendable after demurrer;[3] but afterwards this position was abandoned, and the plea held to be not strictly within the rules of pleading at common law applicable to pleas in abatement, and that it might be amended. Therefore, where the affidavit alleged that "the defendant has absented himself from his usual place of abode in the State of Missouri, so that the ordinary process of law cannot be served upon him," and the defendant filed a plea saying that "at the time stated in the affidavit, he had not absented himself from his usual place of abode in this State, so that the ordinary process of law could be served upon him"; and the plaintiff demurred to the plea; and the defendant asked leave to amend by inserting the word "not" after the word "could"; it was held, that he was entitled to make the amendment.[4] If, after filing such a plea, the defendant plead to the merits of the action, it is a waiver of the plea in abatement.[5] Where time has elapsed between the date of the affidavit and the issue of the writ, this plea puts in issue the truth of the facts alleged at the time the writ was obtained.[6] This mode of contesting the truth of the facts sworn to, being provided by the statute, that question cannot be investigated on a motion.[7] And after the filing of a plea in abatement, it is not competent for the plaintiff to dissolve his attachment, and carry on his action as if it had been commenced by summons; for the statute gives the defendant the right to try the truth of the affidavit, and if the issue be found for him, to have the suit

[1] Revised Statutes of Missouri of 1845, pp. 139, 140.
[2] Livengood v. Shaw, 10 Missouri, 273; Hatry v. Shuman, 13 Ibid. 547.
[3] Livengood v. Shaw, 10 Missouri, 273.
[4] Cayce v. Ragsdale, 17 Missouri, 32.
[5] Hatry v. Shuman, 13 Missouri, 547; Cannon v. McManus, 17 Ibid. 345.
[6] Graham v. Bradbury, 7 Missouri, 281.
[7] Graham v. Bradbury, 7 Missouri, 281; Searcy v. Platte County, 10 Ibid. 269.

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dismissed.[1] This plea does not put in issue the belief of the person making the affidavit, nor the goodness of the reasons for his belief, but the truth of the facts charged.[2] Nor can the intentions of the defendant be inquired into under it, except in those cases in which the statute contemplates such an investigation. Therefore, where the affidavit averred that the defendant had absconded or absented herself from her usual place of abode, so that the ordinary process of law could not be served upon her; and it was shown on the trial that her conduct had been of that character which might well induce the belief that she had absconded at the time the writ issued; it was held, that the court did right in refusing so to instruct the jury as to place before them the question as to the intentions of the defendant, and in instructing them that the only matter for their determination was, whether, at the time of the making of the affidavit, the defendant actually had absconded or absented herself, as charged.[3] Under this plea the defendant cannot take advantage of a misnomer. Elisha Swan and Nelson Deming were sued, and traversed the allegation that they were non-residents, and attempted to give in evidence that Deming's name was not "Nelson," but "Anson L."; but it was held to be inadmissible.[4] Upon a trial of an issue under such a plea, it was held, that evidence that the defendant was largely indebted to others besides the plaintiff was immaterial.[5] Where three grounds of attachment were alleged, and the defendant pleaded in abatement to two of them only, it was held, that the omission to plead to the third ground was not an admission of its truth.[6]

§ 409 *a*. Where two several grounds are stated in the affidavit for the attachment, and a plea in abatement is filed to the affidavit, it is not necessary that both grounds should be proved, but the proving of either will be sufficient to sustain the attachment.[7]

§ 410. In Iowa, a statutory provision formerly existed, authorizing the defendant "to join issue upon the facts and allegations set

[1] Mense *v.* Osbern, 5 Missouri, 544.
[2] Chenault *v.* Chapron, 5 Missouri, 438; Dider *v.* Courtney, 7 Ibid. 500.
[3] Temple *v.* Cochran, 13 Missouri, 116.
[4] Swan *v.* O'Fallon, 7 Missouri, 231.
[5] Switzer *v.* Carson, 9 Missouri, 740.
[6] Kritzer *v.* Smith, 21 Missouri, 296. [7] Tucker *v.* Frederick, 28 Missouri, 574.

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forth in the affidavit," which issue was to be tried by a jury, and if found for the defendant, the attachment was to be dissolved;[1] but in the Code of that State, adopted in 1851, the grounds on which the attachment is sought must be incorporated in the petition, and may be denied in the same manner as any other allegation, and if not denied will be considered as admitted.[2]

[1] Revised Statutes of Iowa, 1843, p. 78. [2] Code of Iowa, ch. 104 and 109.

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CHAPTER XVI.

DISSOLUTION OF AN ATTACHMENT.

§ 411. THE dissolution of an attachment necessarily discharges from its lien the effects or credits on which it was executed, whether reduced to possession by the officer, or subjected in the hands of garnishees. When dissolved, the defendant is entitled to a return of the property, on demand, unless the judgment of dissolution be suspended by writ of error or appeal. This, it is said, takes away the defendant's right to demand a return; and the officer, if he have notice of the writ of error or appeal, would not be justified in returning the property. But if before writ of error or appeal the defendant demands it, and the officer gives it up, it was held in Alabama, that the latter cannot afterwards, on reversal of the judgment, be held responsible for it.[1] This was ruled in a case where the judgment dissolving the attachment was rendered "at the spring term" of the court, and the writ of error was not sued out until the following November, and in the intervening June the sheriff returned the proceeds of the attached property to the defendant.

But where the attachment plaintiff acts promptly in taking the case to a higher court, by appeal or writ of error, operating as a supersedeas, it were a great injustice to him to hold that the officer who attached the property may give it back to the defendant, and escape all liability for it to the plaintiff, when the judgment dissolving the attachment is reversed, and the plaintiff's right to hold the property has been established. In such case, there would hardly seem room for doubt that the contrary view taken by the Supreme Court of Iowa is correct. There the attachment plaintiff, at the same term of the court at which his attachment was dissolved, and within four days after the dissolution, appealed from the judgment, and gave a supersedeas bond; but in the interval the officer, *without any order of the court*, gave back the attached property to the defendant. On the appeal the judgment dissolving the attachment was reversed; and the Supreme Court

[1] Sherrod *v.* Davis, 17 Alabama, 312.

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held, that the plaintiff had not lost his right to recourse upon the attached effects.[1] But in another branch of the same case, that court subsequently held, that this decision had no reference to a case where the rights of third persons were involved. And so, where a sum of money was in the hands of the clerk of the court, as proceeds of the sale of part of the attached property, and between the time when the attachment was dissolved, and that of taking the appeal, the clerk, without knowing that the appeal would be taken, paid over the money to the defendant; it was held, that he could not be made liable, if he paid it in good faith; that if the plaintiff wished the money to remain *in statu quo*, he should have notified the clerk of his intention to appeal; and that if the clerk had paid it over after such notice he would have been liable.[2] But in every such case it is undoubtedly the safest course for the officer to require an order of the court for the payment of the money to the defendant.

§ 412. Where two attachments were executed on the same effects, and that first executed was quashed, and the judgment quashing it was reversed, but in the mean time the property was sold and the proceeds paid to the plaintiff in the second attachment; it was decided that the first attaching creditor was entitled to recover from the second the money paid over to him.[3] But where over three years elapsed before the writ of error was prosecuted, it was held, that the attachment was not revived as against third persons.[4]

§ 413. Where property is attached and sold, and the proceeds paid to the plaintiff, a reversal of the judgment by an appellate court, on grounds not affecting the merits of the plaintiff's claim, will not entitle the defendant to recover the proceeds back from the plaintiff, where it appears that he prosecuted his suit in good faith, believing himself legally entitled to do it. If prosecuted, however, for the purpose of obtaining an undue advantage, by getting hold of the proceeds of the sale of the property, he would not be permitted to avail himself of an advantage thus improperly obtained.[5]

[1] Danforth *v.* Carter, 4 Iowa, 230. [2] Danforth *v.* Rupert, 11 Iowa, 547
[3] Caperton *v.* M'Corkle, 5 Grattan, 177.
[4] Harrow *v.* Lyon, 3 G. Greene, 157.
[5] Jackson *v.* Holloway, 14 B. Monroe, 133.

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§ 414. As attachment is merely a creature of statute, its existence and operation in any case can continue no longer than the law authorizing it is in force. If, during the progress of a suit by attachment, the law under which it was instituted be repealed, without providing for the prosecution of pending suits, there can be no further proceeding, and the attachment will be dissolved.[1]

§ 415. Obviously, a final judgment for the defendant, as it leaves no ground for further proceedings against him, *ipso facto* dissolves an attachment, and leaves the attached property, in relation to the defendant as well as subsequent attachers, in the same condition as before the service of the writ.[2]

Under such circumstances, as well as where the attachment is discharged by a payment of the debt, the officer is bound to return the attached property to the owner; but he cannot be charged as a wrongdoer, for holding it until satisfactory evidence be given him that the attachment has been vacated.[3]

§ 416. Defects in the plaintiff's proceedings are equally fatal to an attachment, unless remediable by amendment. They are usually found in the two preliminaries to the granting of the writ, the affidavit and the bond; of which we have heretofore treated.[4] In such cases the dissolution or quashing of the attachment is generally effected through a motion, based on defects apparent on the face of the proceedings. Indeed, on the hearing of such a motion, nothing will be considered but what is thus apparent.[5] And the motion must specify the grounds upon which it is made. It is not sufficient to say that it is made "because the writ was improperly issued"; there must be a statement of the points of objection upon which the moving party will rely.[6] If there is any intrinsic defect in the proceedings, not discernible on their face, it cannot be brought before the court on a motion of this description, but must be reached in some other mode. For example, an attachment bond is executed in the name of the plaintiff, by an attorney

[1] Stephenson *v.* Doe, 8 Blackford, 508.

[2] Clapp *v.* Bell, 4 Mass. 99; Johnson *v.* Edson, 2 Aikens, 299; Suydam *v.* Huggeford, 23 Pick. 465; Harrow *v.* Lyon, 3 G. Greene, 157; Brown *v.* Harris, 2 Ibid. 505.

[3] Wheeler *v.* Nichols, 32 Maine, 233.

[4] See Chapters V. and VI.

[5] Baldwin *v.* Conger, 9 Smedes & Marshall, 516; Hill *v.* Bond, 22 Howard Pract. R. 272; Cooper *v.* Reeves, 13 Indiana, 53; Wright *v.* Smith, 19 Texas, 297.

[6] Freeborn *v.* Glazer, 10 California, 337.

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in fact. The attorney may have had sufficient authority, or he may not; but whether or not, the court will not inquire into that fact on a motion to dissolve. The scrutiny will not extend beyond the record; and if there is a bond there, though it may in fact have been executed without any valid authority, it is sufficient *pro hac vice* to sustain the attachment.[1] So, where an attachment is taken out by a corporation, the court will not, on such a motion, allow the defendant to show that the corporation had no power under its charter to execute the bond.[2]

In Pennsylvania, however, on a rule to show cause why an attachment should not be set aside, the defendant was allowed to show that the plaintiff had obtained judgment in another State on the same demand, and levied execution there; and the attachment was quashed.[3] But it was not regarded as any objection to an attachment, that the plaintiff had sued out an attachment in another State for the same cause of action, unless, perhaps, the defendant had there given bail.[4] But the pendency of another suit by attachment in the same State, for the same cause of action, was, in Mississippi, held to be good in abatement.[5]

§ 416 *a*. Whether one not a party to the record, but who has an interest in the question, can make a motion to quash the attachment, for defects apparent on the face of the record, does not appear to have been decided; but in Alabama it was held, that no such motion could be made by such a person, for matter *dehors* the record, and which is properly triable by a jury.[6]

§ 417. It is not admissible for the defendant, in order to dissolve an attachment on motion, to show that the debt was not due;[7] or that the amount claimed by the plaintiff is unconscionable or unreasonable.[8] This would be to try in a summary and collateral way the main issue in the cause. Nor can he move to

[1] Lindner *v.* Aaron, 5 Howard (Mi.), 581; Spear *v.* King, 6 Smedes & Marshall, 276; Jackson *v.* Stanley, 2 Alabama, 326; Lowry *v.* Stowe, 7 Porter, 483; Calhoun *v.* Cozzens, 3 Alabama, 21; Goddard *v.* Cunningham, 6 Iowa, 400.

[2] Bank of Augusta *v.* Conrey, 28 Mississippi, 667.

[3] Downing *v.* Phillips, 4 Yeates, 274.

[4] Fisher *v.* Consequa, 2 Washington C. C. 382; Clark *v.* Wilson, 3 Ibid. 560.

[5] James *v.* Dowell, 7 Smedes & Marshall, 333.

[6] Cockrell *v.* McGraw, 33 Alabama, 526.

[7] Fisher *v.* Taylor, 2 Martin, 79, 113; Smith *v.* Elliot, 3 Ibid. 366; Reiss *v.* Brady, 2 California, 132.

[8] Lord *v.* Gaddis, 6 Iowa, 57.

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discharge the attachment on the ground that the property attached did not belong to him.[1]

§ 418. It is said that a motion to dissolve an attachment, for irregularities in the proceedings, is addressed to the discretion of the court, and may be acted on or declined at pleasure; and this discretion will not be controlled by mandamus,[2] or revised by an appellate court on error.[3] But where the judgment of a court has been had in this summary mode, its correctness may be examined on error;[4] but not unless the reasons for dissolving the attachment are spread upon the record, or preserved in a bill of exceptions.[5] Where, however, the objection to the attachment is not on the ground of irregularity, but because it was sued out upon a cause of action not contemplated by the statute, the court in which the action is pending should dismiss the suit,[6] and if it do not, the appellate court will review its action, and itself exercise the remedy.[7]

§ 419. The refusal of the court in which the attachment was brought, to dissolve it on motion, does not preclude its doing so at the final hearing.[8]

§ 420. A mis-recital, in the writ, of the court to which it is returnable, is no ground for dissolving an attachment, where the nature and character of the writ show that it could be returnable only in a particular court.[9] In Alabama, where the practice is to recite in the writ the grounds of attachment set forth in the affidavit, and an affidavit alleged that the defendant "so absconds or conceals himself that the ordinary process of law cannot be served on him," and the writ recited that oath had been made that the defendant "hath removed, or is about to remove himself out of the county, or so absconds or conceals himself that the ordinary

[1] Langdon *v.* Conklin, 10 Ohio State, 439.
[2] *Ex parte* Putnam, 20 Alabama, 592.
[3] Reynolds *v.* Bell, 3 Alabama, 57; Massey *v.* Walker, 8 Ibid. 167; Ellison *v.* Mounts, 12 Ibid. 472; Hudson *v.* Daily, 13 Ibid. 722; Gee *v.* Alabama L. I. & T. Co., Ibid. 579; Gill *v.* Downs, 26 Ibid. 670; Lindsley *v.* Malone, 23 Penn. State, 24.
[4] Reynolds *v.* Bell, 3 Alabama, 57.
[5] Cobb *v.* O'Neal, 1 Howard (Mi.), 581; Freeborn *v.* Glazer, 10 California, 337.
[6] Elliott *v.* Jackson, 3 Wisconsin, 349.
[7] Griswold *v.* Sharpe, 2 California, 17.
[8] Talbot *v.* Pierce, 14 B. Monroe, 195.
[9] Byrd *v.* Hopkins, 8 Smedes & Marshall, 441; Wharton *v.* Conger, 9 Ibid. 510.

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process of law cannot be served upon him"; it was held, that the writ did not follow the terms of the affidavit, and left it uncertain as to the ground of the proceeding, and it was quashed.[1] A contrary doctrine, however, was maintained in Mississippi, where it was held, that such a mis-recital would not vitiate the attachment, if the record showed that the proper averment was made in the affidavit.[2]

§ 420 *a*. The issue of an attachment on Sunday is at common law an irregularity, which, if appearing on the face of the writ, will justify the quashing of it. But if it do not so appear, the court, *where the act of the clerk is judicial, and not merely ministerial*, cannot order the clerk to alter the date of the writ, so as to make it show that it was issued on Sunday, and then quash it.[3]

§ 421. Every attempt to overturn an attachment, on account of defects in the plaintiff's proceedings, must precede the defendant's plea to the merits. When he so pleads, he is considered to have waived all exceptions to such defects;[4] and the court can make no order quashing the attachment, which can interfere with the trial of the issues made by the pleadings.[5] When the defendant appears and moves to dissolve the attachment, it is held, in Missouri, to be such an appearance to the action as will authorize a judgment by default against him, if he fails to plead to the merits, whether he was served with process or not;[6] but not so in Louisiana or Illinois, if he was not so served.[7]

§ 422. An attachment may be dissolved as to subsequent attachments, and yet remain in force as against the defendant. A portion of this subject has been presented in the chapter on Simultaneous, Successive, Conflicting, and Fraudulent Attachments, and

[1] Woodley *v.* Shirley, Minor, 14.

[2] Lovelady *v.* Harkins, 6 Smedes & Marshall, 412; Clanton *v.* Laird, 12 Ibid. 568

[3] Matthews *v.* Ansley, 31 Alabama, 20.

[4] Garmon *v.* Barringer, 2 Devereux & Battle, 502; Stoney *v.* M'Neill, Harper, 156, Young *v.* Grey, Ibid. 38; Watson *v.* M'Allister, 7 Martin, 368; Enders *v.* Steamer Henry Clay, 8 Robinson (La.), 30; Symons *v.* Northern, 4 Jones, 241; Judah *v.* Duncan, 2 Bailey, 454; Gill *v.* Downs, 26 Alabama, 670; Memphis R. R. Co. *v.* Wilcox, 48 Penn. State, 161.

[5] Carr *v.* Coopwood, 24 Mississippi, 256.

[6] Whiting *v.* Budd, 5 Missouri, 443; Evans *v.* King, 7 Ibid. 411.

[7] Bonner *v.* Brown, 10 Louisiana Annual, 334; Johnson *v.* Buell, 26 Illinois, 66.

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in that on Bailment of Attached Property. But there is a class of cases which may properly be considered in this connection, involving the dissolution of the attachment, or the loss of its lien, as against subsequent attachers, *by some act or negligence of the attaching officer.*

§ 423. It is undoubtedly the duty of an officer, in attaching personal property, to reduce the same to possession, so far as, under the circumstances, can be done. And since taking possession in the first instance is of no value unless it be continued, and as an abandonment of the possession by the officer would leave other officers and the community without any notice or intimation of an existing attachment, it is necessary that the officer should, himself, or by another, retain his control or power of taking immediate custody of the property, wherever it is capable of being reduced into actual possession. If he do not, he will be regarded as having abandoned his attachment, and its lien, as to subsequent attachers, or *bonâ fide* purchasers from the defendant, will be lost.[1] As to the defendant, however, no such result will take place. Hence, where a steamboat was attached, but, by agreement between the plaintiff and the master of the boat, was allowed to proceed on its voyage, with the understanding that on its return it should be delivered to the sheriff, subject to the writ, it was held that, as between the parties to the action, the lien of the attachment was not extinguished.[2]

§ 424. It is held, that it is the officer's return upon the writ which perfects, if it does not constitute, the attachment; and that though he may seize property, yet unless he make a proper statement of it in writing on the writ, it cannot be deemed an attachment. The right of the officer to hold the property attached is perfect, before the return of the writ, and will continue till the return day, up to which time he is allowed to make his return, and any delay, within that time, will not invalidate the attachment. But if he do not make a return at all, the attachment is considered

[1] Nichols *v.* Patten, 18 Maine, 231; Waterhouse *v.* Smith, 22 Ibid. 337; Baldwin *v.* Jackson, 12 Mass. 131; Sanderson *v.* Edwards, 16 Pick. 144; Bruce *v.* Holden, 21 Ibid. 187; Taintor *v.* Williams, 7 Conn. 271; Pomroy *v.* Kingsley, 1 Tyler, 294; Fitch *v.* Rogers, 7 Vermont, 403; Sanford *v.* Boring, 12 California, 539; Chadbourne *v.* Sumner, 16 New Hamp. 129.

[2] Conn *v.* Caldwell, 6 Illinois (1 Gilman), 531; Fifield *v.* Wooster, 21 Vermont, 215.

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to be dissolved; but not in such sense as to invalidate it *ab initio*, where the failure to return results from the settlement of the suit between the parties before the return day.[1]

§ 425. The necessity of great circumspection on the part of attaching officers, in keeping possession of attached property, is strikingly illustrated in a case in Massachusetts; where an officer suffered certain articles he had attached, to be mixed with other articles of a like kind which had been previously attached by another officer, who then returned an attachment of the whole by himself. It was held, that the officer who permitted the goods he had attached to be mixed up with those seized by the other, thereby lost his special property in the goods, and that the other officer was entitled to hold them.[2]

§ 426. While it is unquestionably true that the preservation of the lien of an attachment depends upon the continued possession, actual or constructive, of the attached property, by the attaching officer, it is also true that the taking of the property out of his custody by a wrongdoer, without any act on the officer's part abandoning it, will not defeat the attachment. Under such circumstances, he may follow and retake it wherever he may find it, in virtue of his special property in it, or he may maintain an action against the wrongdoer, or against another officer who has subsequently attached it.[3]

§ 427. A question here arises, as to the effect upon an attachment of the removal of the attached property, by the officer, beyond his bailiwick, into a foreign jurisdiction. It seems clear that the mere fact of such removal, without regard to the circumstances connected with it, will not dissolve the attachment. In determining its effect, therefore, regard must be had to the object and manner of the removal. The first point to be determined is, whether the purpose of the officer in the removal was a lawful one; and next, whether his possession of the property, personally or by another, was continued. If the purpose was lawful and the possession continued, the attachment would not be dissolved. But if the purpose was unlawful, though his possession remained, or if

[1] Wilder *v.* Holden, 24 Pick. 8; Russ *v.* Butterfield, 6 Cushing, 242; Williams *v.* Babbitt, 14 Gray, 141.

[2] Gordon *v.* Jenney, 16 Mass. 465.

[3] Butterfield *v.* Clemence, 10 Cushing, 269.

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lawful, and he lost his possession, his special property in the goods would be devested. Thus, where an officer attached certain sheep in Massachusetts, and delivered them to a keeper in Rhode Island, taking his obligation to redeliver them on demand; it was held, that there was no pretence that the officer's special property was thereby determined.[1] Here, the purpose was entirely lawful, and the possession of the keeper was that of the officer.

But where a sheriff attached certain cotton at Vicksburg, in Mississippi, and without authority of law, or of the parties to the suit, shipped it to a commission merchant in New Orleans, with instructions to sell it at private sale, and remit the proceeds to him, and the proceeds were attached in the hands of the merchant by another creditor of the defendant, and the Vicksburg sheriff claimed them; it was held, that the officer had violated his official duty in sending the cotton to New Orleans, and that his special property in it was lost.[2]

§ 428. It is of special importance that an officer should not leave attached property in the possession of the defendant, unless authorized thereto by some statutory provision. The possession of personal property is the only *indicium* of ownership; and to suffer a debtor to retain possession of his property after it has been attached, is *primâ facie* evidence that the attachment is fraudulent in respect of other creditors; whose attachments, or a *bonâ fide* purchase from the defendant, will prevail against the attachment whose lien has thus been lost.[3] And in such case it has been held, that the officer has not even constructive possession of the property.[4] Hence he cannot, consistently with the preservation of his lien, constitute the defendant his agent to keep the property.[5] But though the lien will be lost by suffering the property to go back into the possession of the debtor, that result will not be produced by the defendant or his family being allowed, without interfering with the officer's possession, to use such articles as will not be injured by such use. Therefore, where attached effects were left in the house inhabited by the defendant,

[1] Brownell *v.* Manchester, 1 Pick. 232.

[2] Dick *v.* Bailey, 2 Louisiana Annual, 974.

[3] Gower *v.* Stevens, 19 Maine, 92; Dunklee *v.* Fales, 5 New Hamp. 527; Pomroy *v.* Kingsley, 1 Tyler, 294; Taintor *v.* Williams, 7 Conn. 271; Baker *v.* Warren, 6 Gray, 527; Flanagan *v.* Wood, 33 Vermont, 332.

[4] Knap *v.* Sprague, 9 Mass. 258; Pillsbury *v.* Small, 19 Maine, 435.

[5] Gower *v.* Stevens, 19 Maine 92.

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in the charge of a keeper appointed by the officer, and the keeper suffered the defendant's family to use them, the court, finding that the use was permitted from motives of humanity and compassion, and not with a design to cover the property against creditors by a pretended attachment, held that the attachment was not thereby dissolved.[1]

§ 429. Where an officer leaves attached goods in the possession of the defendant, or has unauthorizedly ceased to retain possession of them, and another officer attempts to attach them, notice to him of the first attachment will not prevent his acquiring a lien on them; for, though an attachment may have been made, yet the second officer may justly assume it to have been abandoned, when the possession of the first officer was relinquished.[2] But if the second officer know that there is a subsisting attachment, and an unrescinded contract of bailment, although the defendant might at the time have the possession of the property, he cannot acquire a lien by attaching it.[3]

§ 430. Where, as in several States, the sale of attached property on *mesne* process is authorized, if an officer make such sale of part of the attached effects, and realize therefrom a sufficiency to pay the debt on which the attachment was obtained, it is held, in Vermont, that that will not dissolve the attachment as to the remainder, or impair the creditor's lien on it, whatever may be the officer's liability for attaching more property than was needed to satisfy the debt.[4]

§ 431. The doctrines so far stated, apply to the acts of the officer himself. We come now to a class of cases which, for convenience, require a separate notice, as involving the results of acts done by parties other than the officer, though the general principles are, on the whole, similar. It is customary, and often necessary, for attaching officers to place attached property, for safe

[1] Baldwin *v.* Jackson, 12 Mass. 131. See Train *v.* Wellington, Ibid. 495; Young *v.* Walker, 12 New Hamp. 502.

[2] Bagley *v.* White, 4 Pick. 395; Sanderson *v.* Edwards, 16 Ibid. 144; Gower *v.* Stevens, 19 Maine, 92; Young *v.* Walker, 12 New Hamp. 502; Flanagan *v.* Wood, 33 Vermont, 332.

[3] Young *v.* Walker, 12 New Hamp. 502.

[4] Marshall *v.* Town, 28 Vermont, 14.

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keeping, in charge of servants appointed by themselves, whose possession is the possession of the officer. In such case the lien of the attachment is in no sense lost by the officer's possession ceasing to be personal. But if the servant placed in charge of the property abandon it, and it come into the possession of an adverse claimant,[1] or be attached by another officer,[2] the lien of the first attachment will be lost.

§ 432. In such cases, what act, what species of possession, and what degree of vigilance, will constitute legal custody, is often a question of difficulty, depending upon a variety of circumstances, having respect to the nature and situation of the property, and the purposes for which custody and vigilance are required; such as protection from depredation by thieves, preservation from the weather and other causes of damage, and especially giving notice to other officers, and to all persons having conflicting claims.[3]

Where wood and lumber lying on a wharf were attached, and placed by the officer in charge of a keeper, and on a Sunday morning the keeper went away from the wharf, and returned in the afternoon, having in the mean time secured the property in the manner usual on Sundays, by locking the gates of the wharf and taking the key with him; it was held, that there was no neglect on the part of the keeper, that his custody was still legal, and that the attachment was not abandoned.[4] So, where an attachment was levied on a parcel of hewn stones lying scattered about on the ground, which were placed by the officer in charge of the plaintiff, whose place of business was about fifty or sixty rods from the place where the stones lay, and in sight of them, and whose boarding-house was also in sight of them; it was held, that, though no removal of the stones took place, yet the officer remained in the constructive possession of them. The court said: "It is not necessary, to continue an attachment, that an officer or his agent should remain constantly in the actual possession. The nature of the possession and custody which an officer is to keep, will depend upon the nature and position of the property, as ships, rafts, piles of lumber, masses of stone, or lighter, or more portable, or more valuable

[1] Carrington v. Smith, 8 Pick. 419.
[2] Sanderson v. Edwards, 16 Pick. 144.
[3] Sanderson v. Edwards, 16 Pick. 144.
[4] Fettyplace v. Dutch, 13 Pick. 388.

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goods. In general it may be said that it shall be such a custody as to enable an officer to retain and assert his power and control over the property, so that it cannot probably be withdrawn, or taken by another without his knowing it. Here, it is manifest the officer did not intend to abandon the attachment, and that the measures he took, considering the bulky nature of the property, and the situation in which it was placed, were sufficient to continue his possession and preserve his attachment."[1]

§ 433. In this connection may properly be considered the effect of the death of the defendant upon an attachment. The decisions on this subject are few, and mostly so connected with local statutes as to have little general applicability. Of this description are the reported cases in Maine and Massachusetts. In a case in the latter State, where the effect of the defendant's bankruptcy after the levy of an attachment was under consideration, SHAW, C. J., in delivering the opinion of the court, used the following language: "As a question of policy and expediency, we are inclined to the opinion that when it becomes necessary to settle and close up the affairs of a debtor, whether at his decease or during his life, true equity would require that all his property, which has not become appropriated and vested by his own act or the operation of law, should be applied to the payment of all his debts, and that an attachment on *mesne* process, being a sequestration of his property, and placing it provisionally in the custody of the law, should give way to the more general sequestration of all his property for the satisfaction of all his debts. In that case the creditor will receive the whole amount of his debt, if there be assets, and his satisfaction *pro rata*, if there be a deficit; and as between him and other creditors there seems no equitable ground on which he should have more. Such is the law in Massachusetts in regard to the settlement of the estate of a deceased insolvent debtor, where the settlement and distribution of the estate must necessarily be final. Upon the appointment of an administrator, who takes the property as trustee for all the creditors, all attachments on *mesne* process are dissolved."[2]

In Pennsylvania, where a foreign attachment, as under the custom of London, is a process to compel the appearance of a non-resident debtor, by distress and sale of the property attached,

[1] Hemmenway v. Wheeler, 14 Pick. 408. [2] Davenport v. Tilton, 10 Metcalf, 320.

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it is held, that the death of the defendant before final judgment dissolves the attachment, if he shall not have entered special bail. But his death after final judgment does not have that effect. In the case in which these points were decided, the court say: "If these proceedings were in all respects *in rem*, they would not abate by the death of the defendant. For some purposes they are to be so considered; for execution can only be against the goods attached, and not against the person of the defendant; but to every purpose they are not; for by entering special bail, the attachment is dissolved, and it then becomes a mere personal action."[1] The United States Circuit Court for the District of Columbia held the same position.[2]

In Louisiana, it was decided that an attaching creditor acquires no privilege upon the property of a debtor, in that State, who dies during the pendency of the suit, and whose estate is administered upon there, so as to entitle him to priority of payment out of the assets of the estate.[3]

In Tennessee the rule is, that, if the defendant die *pendente lite*, no judgment can be rendered without making his administrator a party; and after judgment against the administrator, no order for the sale of real estate attached can be made, without making the heirs parties to the proceeding;[4] but where these steps were taken, the court ordered a sale of the land; which was in effect to hold that the attachment was not dissolved by the death of the defendant.[5]

In Missouri, it was decided that the death of the defendant before judgment dissolves the attachment;[6] and that if the death take place after the rendition of a judgment without personal service, and therefore binding only the property attached, the same result will follow.[7]

In South Carolina it was held, that a foreign attachment abates by the death of the defendant pending the suit; but when the garnishee has made default, judgment may be had against him after the defendant's death.[8]

[1] Fitch *v.* Ross, 4 Sergeant & Rawle, 557.
[2] Pancost *v.* Washington, 5 Cranch, C. C. 507.
[3] Collins *v.* Duffy, 7 Louisiana Annual, 39.
[4] Groen *v.* Shaver, 3 Humphreys, 139.
[5] Perkins *v.* Norvell, 6 Humphreys, 151.
[6] Sweringen *v.* Eberius, 7 Missouri, 421.
[7] Harrison *v.* Renfro, 13 Missouri, 446.
[8] Kennedy *v.* Raguet, 1 Bay, 484; Crocker *v.* Radcliffe, 1 Constitutional Court Rep. (Treadway), 83.

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In New York it was held, that the plaintiff acquired by the attachment a right in the property attached, which could not be defeated by the death of the defendant, if the action survived, and the court had power to continue it against the representative.[1]

§ 433 *a*. Whatever diversity of views may exist, as to the effect upon a pending attachment of the death of the defendant, there can be no doubt that a suit by attachment, commenced after the death of the defendant, is utterly void, and therefore that no attachment of property, or proceeding by garnishment, in such suit, can have any validity whatever.[2]

§ 434. The same views which would abate or dissolve an attachment upon the death of a person, would produce a like result in the case of the civil death of a corporation; and it has been so decided in Pennsylvania and Alabama.[3]

§ 435. In this connection, too, may properly be considered the effect upon an attachment of an act of bankruptcy committed by the defendant after the levy of the writ. Does that act dissolve an attachment previously made? This question has excited elaborate discussion by some of the first jurists of the country. It will at once be seen to turn altogether on the point whether an attachment is *a lien*, in such sense as to be within that clause of the Bankrupt Law which protects existing liens against the operation of the law. If a lien, the attachment cannot be dissolved by an act of bankruptcy on the part of the defendant.

The late Justice STORY, on more than one occasion, during the existence of the General Bankrupt Act of 1841, decided that an attachment was not a lien, either in the sense of the common law, or of the maritime law, or of equity; but only a contingent and conditional charge, until the judgment and levy; and therefore was dissolved by the defendant's bankruptcy.[4] In this judgment, that learned jurist stood opposed by every other tribunal in the

[1] Moore *v.* Thayer, 10 Barbour, 258; s. c. 6 Howard Pract. R. 47; 3 Code Reporter, 176; Thacher *v.* Bancroft, 15 Abbott Pract. R. 243.

[2] Loring *v.* Folger, 7 Gray, 505.

[3] Farmers and Mechanics' Bank *v.* Little, 8 Watts & Sergeant, 207; Paschall *v.* Whitsett, 11 Alabama, 472. In Lindell *v.* Benton, 6 Missouri, 361, it was held, that the civil death of a corporation, after the garnishment of its debtor, did not prevent the subjection of the garnishee to liability.

[4] Foster's Case, 2 Story, 131; Bellows and Peck's Case, 3 Story, 428.

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United States before which the question was made, except the Supreme Court of Louisiana.[1] The great weight attached to his views on any question led, after the promulgation of those decisions, to several very able opinions in favor of the opposite conclusion. Indeed, in every instance where the subject was passed upon, with the single exception just named, the lien of the attachment was sustained. The District Court of the United States for Vermont,[2] the late Justice Thompson, of the Supreme Court of the United States,[3] and the Supreme Courts of Maine,[4] New Hampshire,[5] Massachusetts,[6] New Jersey,[7] and Mississippi,[8] all concurred in that result. The Supreme Court of Connecticut, in a case arising under the Bankrupt Act of 1800, also held views opposed to those of Justice Story.[9] We are therefore justified in considering it settled that an attachment is not dissolved by the bankruptcy of the defendant.

[1] Fisher *v.* Vose, 3 Robinson (La.), 457.
[2] Downer *v.* Brackett, 5 Law Reporter, 392; s. c. 21 Vermont, 599; Rowell's Case, 6 Law Reporter, 300; s. c. 21 Vermont, 620.
[3] Haughton *v.* Eustis, 5 Law Reporter, 505.
[4] Franklin Bank *v.* Batchelder, 23 Maine, 60.
[5] Kittredge *v.* Warren, 14 New Hamp. 509; Kittredge *v.* Emerson, 15 Ibid. 227; Buffum *v.* Seaver, 16 Ibid. 160.
[6] Davenport *v.* Tilton, 10 Metcalf, 320.
[7] Vreeland *v.* Brown, 1 Zabriskie, 214.
[8] Wells *v.* Brander, 10 Smedes & Marshall, 348.
[9] Ingraham *v.* Phillips, 1 Day, 117.

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CHAPTER XVII.

NOTICE TO ABSENT DEFENDANTS BY PUBLICATION.

§ 436. THE mere issue of a writ of attachment, and levying it on the property of the defendant, without service of process on him, without notice to him in any way, and without appearance on his part, is not a sufficient foundation for a judgment in the attachment suit against him.[1] And as in many cases the absence of the defendant would preclude the possibility of service of process on him, provision is usually made in attachment laws for notice by publication to absent defendants, of the institution and pendency of attachment suits against them, in order that they may, if they see proper, appear and defend. This is one of the guards provided for the protection of defendants, and the requirements of every statute in this respect should be strictly enforced.

§ 437. This notice is not necessary to give the court jurisdiction of the action. Its object is simply to inform the defendant, if possible, that proceedings have been taken against him. Whether a court has jurisdiction of any particular proceeding is determined by establishing its authority to take the first step therein. Whether it can legally continue to exercise that jurisdiction, depends upon the taking of the proper steps after the first. When, therefore, in an attachment cause, the ground required by statute has been laid for the issue and execution of the process, and the process has been issued and executed, the jurisdiction of the court has attached. If this ground be not laid, there is no right to take the first step, and that and all subsequent ones are simply void. When, however, jurisdiction has been attained, the subsequent proceedings must conform to the law, in order to make the action of the court effectual. Want of such conformity will be error, and, therefore, a good ground for reversing the judgment of the court; but will not make the proceedings void. When, therefore, notice to the defendant by publication is required, it is not an ele-

[1] Edwards *v.* Toomer, 14 Smedes & Marshall, 75; Ridley *v.* Ridley, 24 Mississippi, 648; Martin *v.* Dryden, 6 Illinois (1 Gilman), 187.

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ment of the jurisdiction of the court, but is necessary to authorize the court to exercise its jurisdiction by giving judgment in the cause.[1] And it must appear in the record that the court had satisfactory evidence that the notice was given, or the evidence itself must be therein set out.[2]

§ 438. This subject presents itself in a twofold aspect: 1. As to the sufficiency of the notice, as the foundation for further proceedings in the cause; and, 2. As to the effect of failing to publish notice, or of publishing an insufficient one, upon the validity of the subsequent proceedings in the suit, when afterwards called in question *inter alios*.

§ 439. Under the first head, the sufficiency of the notice to authorize judgment against the defendant depends upon its conformity to the statute in its terms and its publication. As to the terms, there should be a substantial, if not a strict compliance with the law. Therefore, where the advertisement was required to "state the names of the parties, the day, month, and year, when, and from what court, and for what sum, the writ issued," and it omitted to state the day, month, and year when the writ issued, it was held to be insufficient.[3]

§ 440. In Missouri, where the statute required "the court to order a publication to be made, stating the nature and amount of the plaintiff's demand," &c., it was held that stating in the notice "that an action of assumpsit for the sum of $403.70 had been commenced against him," was a sufficient statement of the nature of the plaintiff's demand.[4]

§ 441. In Michigan, the statute requires the clerk, upon the return of the writ, to make out an advertisement, stating the names of the parties, the time when, from what court, and for what sum, the writ was issued. A notice containing all the statute required, was made out and published, bearing date November 23, 1843, and stating that the writ was issued on the 12th of June,

[1] Paine *v.* Mooreland, 15 Ohio, 435; Williams *v.* Stewart, 3 Wisconsin, 773; Beech *v.* Abbott, 6 Vermont, 586. *Sed contra*, Calhoun *v.* Ware, 34 Mississippi, 146.

[2] Foyles *v.* Kelso, 1 Blackford, 215; Haywood *v.* McCrory, 33 Illinois, 459.

[3] Ford *v.* Wilson, Tappan, 235.

[4] Sloan *v.* Forse, 11 Missouri, 126.

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1843, and was "returnable to the second Tuesday after the first Monday in November *next*," instead of *instant*. It was held to be a mere clerical mistake, which would not mislead, and did not vitiate the proceeding.[1]

§ 442. In regard to the time of publication, it was held, that where publication was required to be made for two months, it was not sufficient to publish it for eight weeks.[2]

§ 443. Under a statute requiring notice to be published for four weeks successively, an affidavit was made stating that it had been so published, once every week, commencing on the 24th of April and ending on the 5th of May; and it was held, that the statement that it had been published four weeks successively was sufficient, and the additional statement assigning the dates of the commencement and conclusion of the publication, was surplusage, and did not vitiate the previous general statement.[3]

§ 444. Where the law provided that the defendant should be notified of the pendency of the attachment, by publication of a notice in a newspaper for four weeks successively; and, in case sixty days should not intervene between the first insertion of the notice and the first term of the court, the cause should be continued; it was held, that the proper rule for the computation of time in such case, was to exclude the day on which the notice was first inserted, and include the day on which the term commenced; and that a notice first inserted on the 27th of May, was not good for a term of court beginning on the 25th of July.[4]

§ 445. Where the law declared that no judgment should be entered on the attachment until the expiration of twelve months; during which time the plaintiff should cause notice of the attachment to be advertised three weeks successively in a public newspaper; it was held, that publication at any time within the twelve months was sufficient.[5] And where the statute does not fix any time within which the publication shall be commenced, it was held,

[1] Drew *v.* Dequindre, 2 Douglass, 93.
[2] Pyle *v.* Cravens, 4 Littell, 17; Lawlin *v.* Clay, Ibid. 283.
[3] Swayze *v.* Doe, 13 Smedes & Marshall, 317.
[4] Vairin *v.* Edmonson, 10 Illinois (5 Gilman), 270.
[5] Harlow *v.* Becktle, 1 Blackford, 237.

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that a delay of publication for two years and a half was not a sufficient ground for setting aside the attachment proceedings.[1]

§ 446. A common occurrence is for legislatures to change the times of holding courts. Where by any such law the term of a court is fixed for a time anterior to that at which it was formerly established, and the full time required by law for publication of notice is thereby abridged, no proceedings in the attachment suit, depending for their validity upon the correct publication of the notice, can properly be taken. Therefore, where the law required publication for six months, and after publication was ordered, the legislature passed a law requiring the court to be held at an earlier day than before, which allowed only four months for publication, and judgment was taken at the end of four months, it was considered erroneous, and was reversed.[2]

§ 447. But a much more serious question than any that have been mentioned, arises when title is claimed under judgments in attachment cases, where there has been insufficient publication, or none at all. Upon this point, it was decided in Indiana, in an action of ejectment for the recovery of land, purchased at sheriff's sale in an attachment suit, that insufficiency of publication did not invalidate the proceedings, so as to allow them to be impeached collaterally.[3]

§ 448. In Ohio, in a similar case, it was at one time held, that the fact of the notice required by statute not having been given, made the judgment and sale under it void, and that the purchaser at the sale acquired no title;[4] but the Supreme Court of that State afterwards reversed itself on this point, and held, as has also been held in Vermont,[5] New York,[6] and Wisconsin,[7] that the proceedings of the court are not so invalidated by the failure to make publication, as to make the sale under them void.[8] But in Mary-

[1] Matter of Clark, 3 Denio, 167.

[2] Saffaracus v. Bennett, 6 Howard (Mi.), 277; Colwell v. Bank of Steubenville, 2 Ohio, 229, 2d Edition, 377.

[3] Zeigenhagen v. Doe, 1 Indiana, 296.

[4] Warner v. Webster, 13 Ohio, 505.

[5] Beech v. Abbott, 6 Vermont, 586.

[6] Matter of Clark, 3 Denio, 167.

[7] Williams v. Stewart, 3 Wisconsin, 773.

[8] Paine v. Mooreland, 15 Ohio, 435. In this case the action was ejectment, and the

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land a judgment rendered without notice, personal or constructive, to the defendant, or appearance by him, is wholly void, though property be attached.[1]

defendant claimed title under a sheriff's deed, made in pursuance of a sale under execution, in an attachment suit, where the notice required by statute was not given. This title was impeached on the ground of the nullity of the proceedings in the attachment suit. We present the opinion of the court on this point.

"Are the proceedings in attachment void? It is contended they are void, because no notice of the pendency of the attachment was given, as required by the statute. If the jurisdiction of the court once attached, subsequent irregularities would render the judgment voidable only; and it would remain valid until reversed, and cannot be impeached collaterally.

"What, then, gives the court jurisdiction in a proceeding in attachment? The filing of the proper affidavit, issuing the writ, and attaching the property. The moment the writ goes into the hands of the officer, he is authorized and required to seize the property. When this is done, the property is taken out of the possession of the debtor into the custody of the law. The court have authority, at any time after the return of the writ, to direct property of a perishable nature to be sold. It is not until after the return of the writ that the clerk is directed to make out the advertisement, which the plaintiff is required to have published as the statute directs. If he neglects to have such notice published, for six weeks successively, the statute directs that the attachment shall be dismissed with costs. Here, then, for a period of six weeks, at least, if the publication of the notice only gives jurisdiction, the court both have and have not jurisdiction over the property seized in attachment. It is contended the court has no jurisdiction, and yet the statute authorizes the court to exercise a judicial act over property attached, namely, to determine whether it is perishable, and if so, to direct its sale. Will it be contended, then, that the court has jurisdiction over perishable property before notice consummated, but not over property not perishable? This is a distinction not authorized by the statute.

"A court acquires jurisdiction by its own process. If the process of the court be executed upon the person or thing concerning which the court are to pronounce judgment, jurisdiction is acquired. The writ draws the person or thing within the power of the court; the court once having by its process acquired the power to adjudicate upon a person or thing, it has what is called jurisdiction. This power or jurisdiction is acquired only by its process. To give jurisdiction is the object of process. The mode of executing or serving process, is sometimes directed or permitted to be by notice of publication. All process issues under the seal of the court. Notice by publication is not process, but, in certain cases in contemplation of law, is equivalent to service of process. The process in attachment is the writ authorizing and directing a seizure of the property. No process is issued against the person, because the proceeding is *in rem*. The statute, however, regards it but just that notice should be given to the debtor, not for the purpose of giving the court jurisdiction over the subject-matter, but to permit the debtor to have an opportunity to protect his rights, and directs that the writ shall be quashed if it be not given. The distinction is between a lack of power or want of jurisdiction in the court, and a wrongful or defective execution of the power. In the first instance, all acts of the court not having jurisdiction or power, are void, — in the latter, voidable only. A court, then, may act, first without power or jurisdiction; second, having power or jurisdiction, may exercise it wrongfully; or, third, irregularly. In the first instance, the act or judgment of the court is wholly void, and is as though it had not been done. The second is wrong, and must be reversed on error. The third is irregular, and must be corrected by motion. The latter is where the power is rightfully exercised, but in an irregular way. Hence there is a vast dis-

[1] Clark *v.* Bryan, 16 Maryland, 171.

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§ 449. But where no process is served on the defendant, nor property attached, nor garnishee charged, nor appearance entered, a judgment against the defendant, based on a publication of the pendency of the suit, will be void, and may be impeached collaterally, or otherwise, and forms no bar to a recovery sought in opposition to it, nor any foundation for a title claimed under it.[1]

tinction between a defect of power, a wrongful exercise of power, and an irregular exercise of power.

"Now, what has happened in this instance? The court had the power, by the service of its process, to proceed and give judgment; but a circumstance occurred, after having acquired such power, which forbade them the exercise of it; but having it, they did exercise it, which was error. But it can only be corrected by a writ of error.

"We rest the case, nakedly, upon the ground, so far as the proceedings in attachment are concerned, that there was a judgment of a court of competent jurisdiction, unreversed, conferring the power to sell the land in question, which cannot be impeached in this collateral way; that the defects and irregularities complained of should have been remedied by writ of error, or motion."

[1] Eaton *v.* Badger, 33 New Hamp. 228; Carleton *v.* Washington Ins. Co. 35 Ibid 162; Ante, § 5.

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CHAPTER XVIII.

GARNISHMENT. — GENERAL VIEWS. — DIVISION OF THE SUBJECT.

§ 450. We come now to that operation of an attachment, whereby property that cannot be seized may be reached by the process, and debts due to the defendant may be subjected to the payment of his debts. This is the sole and distinctive feature of attachment by the custom of London, from which, as before remarked, have sprung the systems of attachment laws in the United States.

§ 451. The peculiar operation of the process, by which effects of the defendant which cannot be seized and taken into custody may still be rendered liable to the payment of his debts, has received the designation of *garnishment*, or warning, and the person in whose hands such effects are attached is styled a *garnishee*, because of his being *garnished*,[1] or warned, not to pay the money or deliver the property of the defendant in his hands to him, but to appear and answer the plaintiff's suit.[2] This designation exists in all the States, except those of New England, where the party so warned is called a *trustee*, and the process under which he is warned is called *trustee process*. In Vermont and Connecticut, he is also sometimes called a *factor*, and the process, *factorizing process*. The terms *garnishment* and *garnishee* being, however, so nearly of universal use, will be retained throughout this work.

§ 452. Garnishment is in the nature of a proceeding *in rem*, since its aim is to invest the plaintiff with the right and power to appropriate, to the satisfaction of his claim against the defendant, property of the defendant's in the garnishee's hands, or a debt due from the garnishee to the defendant.[3] It is, in effect, a suit by the

[1] This being the first instance of the use of this word in this book, I deem it proper to remark, that I have studiously avoided the very prevalent — indeed, almost universal — corruption of it into "garnisheed," which disfigures the Reports of this country. I have, with equal care, shunned the displacement of the words "garnish" and "garnishing," by "garnishee" (used as a verb), and "garnisheeing."

[2] Priv. Londini, 256; Comyns's Digest, Attachment, E.

[3] In Strong *v.* Smith, 1 Metcalf, 476, the Supreme Court of Massachusetts, said:

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defendant, in the plaintiff's name, against the garnishee, without reference to the defendant's concurrence, and, indeed, in opposition to his will. Hence the plaintiff usually occupies, as against the garnishee, just the position of the defendant, with no more rights than the defendant had, and liable to be met by any defence which the garnishee might make against an action by the defendant. Where, however, the garnishee holds property of the defendant under a fraudulent transfer or arrangement, the right of the plaintiff to hold the garnishee is not limited by the defendant's right against the latter. And there are other cases, as we shall hereafter see, in which a garnishee may be held, though the defendant could not at the time of the garnishment maintain an action against him.[1]

Garnishment is not only in effect a suit by the defendant in the plaintiff's name against the garnishee, but it has in several instances been held to be in fact a suit, in the legal acceptation of the term. In Alabama, garnishment was regarded as a suit, where an administrator was garnished, within six months after grant of letters of administration, and the proceeding was objected to, because of a statutory provision which declared that "no suit must be commenced against an administrator as such, until six months after the grant of letters of administration."[2] In the Circuit Court of the United States in Arkansas, before DANIEL, J., the question came up in this shape. A., a citizen of Arkansas, recovered judgment in that court against B., a citizen of Texas, and issued execution thereon, under which, in conformity with a statute of Arkansas, C., a citizen of that State, was summoned as garnishee. The question was, whether, as the plaintiff and the garnishee were citizens of the same State, the court had jurisdiction of the proceeding. If the garnishment was a suit, it came within the provision prohibiting the court from taking jurisdiction of a suit between citizens of the same State. The court, in the following terms, held it to be a suit: "The proceeding must be regarded as a civil suit, and not as a process of execution to en-

"The trustee process operates as a species of compulsory statute assignment, by which a creditor may obtain that by operation of law which his debtor might voluntarily assign to him, in payment of his debt."

[1] Post, § 464.

[2] Moore v. Stainton, 22 Alabama, 831; Travis v. Tartt, 8 Ibid. 574. See Thorn v. Woodruff, 5 Arkansas, 55; Gorman v. Swaggerty, 4 Sneed, 560; Jones v. New York & Erie R. R. Co., 1 Grant, 457; Malley v. Altman, 14 Wisconsin, 22.

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force a judgment already rendered. It may be used as a means to obtain satisfaction of a demand, in the same manner as a suit may be resorted to on a judgment of another State, with a view to coerce the payment of such judgment. In this proceeding the parties have day in court; an issue of fact may be tried by a jury, evidence adduced, judgment rendered, costs adjudged, and execution issued on the judgment. It is in every respect a suit, in which the primary object is to obtain judgment against the garnishee, and certainly cannot with any plausibility be treated as process of execution, or as part of the execution process; for if so, there could be no necessity or propriety in resorting to this forum to investigate the relations of debtor and creditor."[1]

§ 453. Garnishment is an effectual attachment of the effects of the defendant in the garnishee's hands,[2] differing in no essential respect from attachment by levy, except, as is said, that the plaintiff does not acquire a clear and full lien upon the specific property in the garnishee's possession, but only such a lien as gives him the right to hold the garnishee personally liable for it or its value.[3] The defendant's rights in the property are so far extinguished, as to prevent his making any disposition of it which would interfere with its subjection to the payment of the plaintiff's demand, when that shall have been legally perfected; but for every purpose of making any demand which may be necessary to fix the garnishee's liability to him, or of securing it by legal proceedings or otherwise,

[1] Tunstall *v.* Worthington, Hempstead, 662. *Sed contra,* Kidderlin *v.* Myer, 2 Miles, 242.

[2] Kennedy *v.* Brent, 6 Cranch, 187; Parker *v.* Kinsman, 8 Mass. 436; Blaisdell *v.* Ladd, 14 New Hamp. 129; Burlingame *v.* Bell, 16 Mass. 318; Swett *v.* Brown, 5 Pick. 178; Tindell *v.* Wall, Busbee, 3; Tillinghast *v.* Johnson, 5 Alabama, 514; Thompson *v.* Allen, 4 Stewart & Porter, 184; Bryan *v.* Lashley, 13 Smedes & Marshall, 284; Watkins *v.* Field, 6 Arkansas, 391; Martin *v.* Foreman, 18 Ibid. 249; Hacker *v.* Stevens, 4 McLean, 535.

[3] Walcott *v.* Keith, 2 Foster, 196; Moore *v.* Holt, 10 Grattan, 284; Johnson *v.* Gorham, 6 California, 195. It is a common expression by courts, that by garnishment the plaintiff acquires a lien on the debt due from the garnishee to the defendant; but perhaps the view stated in the text is the more proper one. In Illinois it was held, that garnishment imposes no lien upon the effects in the garnishee's hands, and does not put them *in custodia legis.* Bigelow *v.* Andress, 31 Illinois, 322. In South Carolina, on the other hand, the Court of Appeals said: "Our opinion is, that an actual seizure is not essential to create the attachment lien, but that the service of the writ, on one in whose custody or control the assets of the absent debtor may be, is sufficient to make the whole assets in his hands secure and liable in law, to answer any judgment that shall be secured and awarded upon that process." Renneker *v.* Davis, 10 Richardson Eq. 289. In Vermont, garnishment was termed an "inchoate lien." Wilder *v.* Weatherhead, 32 Vermont, 765.

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his rights remain unimpaired by the pending garnishment, but, of course, can be exercised only in subordination to the lien thereby created.[1] From the time of the garnishment, the effects in the garnishee's possession are considered as *in custodia legis*, and the garnishee is bound to keep them in safety, and, it was said by the Supreme Court of the United States, is not at liberty to change them, to convert them into money, or to exercise any act of ownership over them.[2] He acquires a special property in them, as agent of the court,[3] and is entitled to hold them, until the question of his liability is determined, as well against the defendant as against any subsequent purchaser or pledgee;[4] even though the attachment be against a person other than the ostensible owner from whom the garnishee received them.[5] They cannot lawfully be levied on and taken out of his possession;[6] but if that should be done, the officer seizing must hold them subject to the lien of the creditor who effected the garnishment.[7] If so taken,[8] or if taken from him by a wrongdoer,[9] it will not discharge the garnishee's liability; but it may furnish ground for delaying proceedings until damages can be recovered of the party taking them.[10] But if the garnishing plaintiff cause a levy and sale under execution to be made of the property, he cannot afterwards hold the garnishee in respect thereof.[11]

§ 453 *a*. The position assumed by the Supreme Court of the United States, as stated in the next preceding section, that the garnishee is bound to keep the effects in his hands safely, and is not at liberty to change them, to convert them into money, or to exercise any act of ownership over them, must be understood with reference to the facts of the case before that court. There the

[1] Hicks *v*. Gleason, 20 Vermont, 139.

[2] Brashear *v*. West, 7 Peters, 608; Mattingly *v*. Boyd, 20 Howard Sup. Ct. 128; Biggs *v*. Kouns, 7 Dana, 405. See Staniels *v*. Raymond, 4 Cushing, 314, where, under the Massachusetts statute, a view is entertained, which, so far as that State is concerned, materially modifies the garnishee's position.

[3] Erskine *v*. Staley, 12 Leigh, 406.

[4] Walcott *v*. Keith, 2 Foster, 196.

[5] Stiles *v*. Davis, 1 Black, 101.

[6] Scholefield *v*. Bradlee, 8 Martin, 495; Erskine *v*. Staley, 12 Leigh, 406.

[7] Burlingame *v*. Bell, 16 Mass. 318; Swett *v*. Brown, 5 Pick. 178.

[8] Parker *v*. Kinsman, 8 Mass. 436.

[9] Despatch Line *v*. Bellamy Man. Co., 12 New Hamp. 206.

[10] Despatch Line *v*. Bellamy Man. Co., 12 New Hamp. 206.

[11] Goddard *v*. Hapgood, 25 Vermont, 351; Clapp *v*. Rogers, 38 New Hamp. 435.

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property in the garnishee's hands was merchandise; concerning which the position taken was undoubtedly correct. But where the attachment of *choses in action* is authorized by statute, the rule is not carried to the same extent. In Missouri this is authorized, and a garnishee may there be charged in respect of *choses in action* in his hands belonging to the defendant. In a case which arose there, a bank was summoned as garnishee, having in its possession, for collection, a bill of exchange belonging to the defendant, upon which it brought suit against the acceptor, who set up the garnishment of the bank as a bar to its right to maintain an action on the bill; but it was held, that the bank's right of action was not lost by the fact of the garnishment.[1]

§ 454. Garnishment cannot be extended in its operation beyond the mere matter of reaching the property or effects of the defendant. It has, and can have, no effect, as an attachment of the property of the garnishee, as security for the payment of the judgment which may be recovered against him, as garnishee; nor can any distinct proceeding, unless expressly authorized by statute, be based on the garnishment to accomplish that object. Therefore, where, in a proceeding in chancery, certain parties were garnished, and afterwards the complainant filed a supplemental bill, suggesting that they were bankrupt, and had sent large quantities of their goods to certain parties for sale at auction, and that, if the proceeds of the sale of the goods should be paid to the garnishees, they would contrive so to dispose of them, that the complainant would lose all benefit of the decree; and the court thereupon granted a restraining order on the auctioneers; and upon their answering, showing the balance remaining in their hands, they were, on the final hearing, decreed to pay it to the complainant; it was held, that the proceeding was unauthorized.[2] Much less is there any authority for a Court of Chancery to attach a debt due to a debtor of the defendant, and apply it to the payment of the defendant's debt.[3]

§ 454 *a*. Garnishment can have no retroactive effect, so as to affect prior transactions between the garnishee and the defendant,

[1] Bank of the State of Missouri *v.* Bredow, 31 Missouri, 523.
[2] Wolf *v.* Tappan, 5 Dana, 361. See Parker *v.* Farr, 2 Browne, 321
[3] Jones *v.* Huntington, 9 Missouri, 249.

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or to subject the former to liability on account of property of the latter which was in his hands previous to the garnishment, but not at that time. Thus, where the garnishee, prior to the garnishment, had had property of the defendant in his possession under a secret trust, which would have been void as against creditors; but before he was garnished he had delivered the property to the defendant; it was held, that he could not be charged.[1]

§ 454 *b*. Garnishment can have no effect to overthrow trusts, in order to reach moneys supposed to belong to a debtor. Whatever of money or property of the debtor is sought to be reached by this proceeding, must be his *absolutely*, disencumbered of any trust declared in his favor, or that of any other person. Thus, where a testator bequeathed to his son a sum of money "*for the support of himself and family, and for no other purpose*"; and a part of that sum had been recovered, and paid to the attorney of the son, in whose hands it was attached; the court held, that the money was a *trust fund* under the will, in which the son had no such absolute right as to authorize its being attached for his debts, either before or after it came into his hands. "The will," said the court, "should be carried out according to the intent of the testator. And we can have no possible doubt that it was his object to create the money in the hands of his son a trust fund, for the use specified in the will. The testator not only used affirmative words, appropriate to create a trust fund, but he saw fit at the same time to add a negative. The words are, — 'for the support of himself and family, *and for no other purpose*.' To hold that under this will the son took the money absolutely as his own, and not as a trust fund, would be to pervert the use of language, and the obvious intent of the testator."[2]

§ 455. In garnishment, as in the case of a levy, attachments take precedence in the order of their service. The right of several attaching creditors, as between themselves, by virtue of their successive processes, to reach the effects of their common

[1] Bailey *v.* Ross, 20 New Hamp. 302. See Emerson *v.* Wallace, Ibid. 567. In Whittier *v.* Prescott, 48 Maine, 367, it was held, that one who had received a gratuitous gift of money, will not be chargeable therefor as garnishee of the donor, although the debt sued for existed prior to the gift, if the case does not disclose that the donor was insolvent or largely indebted.

[2] White *v.* White, 30 Vermont, 338.

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debtor in the hands of a garnishee, is a matter of strict law, and unless the creditor in the prior process perfects his right as against the garnishee, by obtaining final judgment that may be enforced in the manner provided by law, his process will fail to postpone or defeat the subsequent attachers in reaching such effects. Thus, where a garnishee, under an arrangement with the first of several attaching creditors and the defendant, paid his debt to such creditor, and the latter did not prosecute his suit to judgment against the garnishee and the defendant, the garnishee was held still liable to a subsequent attaching creditor, who completed his judgment, and whose process was served prior to such arrangement.[1] And so, if a junior attachment be first ripened into a judgment, that gives no right to priority of recourse against the garnishee, over a writ previously served.[2] And where one has been subjected to garnishment in different jurisdictions, and makes known, to the court in which he was last served, the fact of the previous garnishment, that court will take such measures as it may deem expedient, to protect him from double liability, and at the same time to continue his responsibility to its authority, in the event of his release from that of the court in which he was previously garnished. In such a case the Supreme Court of Louisiana considered, that there should be a stay of proceedings for a seasonable time, or that the plaintiff should give proper security to the garnishee, to indemnify him against loss from the previous attachment.[3]

§ 456. After the foregoing general remarks, the first inquiry naturally presenting itself is for general principles regulating the liability of garnishees. This liability may result, as we shall hereafter fully see, either from the possession by the garnishee, when summoned, of personal property belonging to the defendant, or from his being, at that time, indebted to the defendant. It will, therefore, at once be apparent, that many questions must arise, as to the nature and condition of the property in the garnishee's hands, and the nature, extent, and qualifying circumstances of his liability as a debtor of the defendant, necessarily

[1] Wilder *v.* Weatherhead, 32 Vermont, 765. Ante, § 262.

[2] Erskine *v.* Staley, 12 Leigh, 406; Moore *v.* Holt, 10 Grattan, 284; Talbot *v.* Harding, 10 Missouri, 350; Johnson *v.* Griffith, 2 Cranch, C. C. 199; Arledge *v.* White, 1 Head, 241.

[3] Woodruff *v.* French, 6 Louisiana Annual, 62.

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involving the determination of many legal principles. These questions will be considered in their appropriate order: at present it is important to lay the groundwork of general principles.

§ 457. It is necessary, in the first place, to bear in mind, that, wherever the distinction exists between common law and chancery jurisdiction, courts of law cannot undertake, by garnishment, to settle equities between the parties, in order to subject an equitable demand, which the defendant may have against the garnishee, to the payment of the defendant's debt. Where this distinction does not exist, and both branches of jurisdiction are, as it were, fused into one, or where, as in some States, courts of chancery are vested with jurisdiction in attachment cases, the rule may be different. In courts of law, however, garnishment must be considered as a legal and not an equitable proceeding, and consequently the defendant's rights to the fund or property sought to be condemned must be legal, as contradistinguished from equitable. If this rule be departed from, there will be no stopping point, and we must go the full length, and claim that the equitable rights of the defendant may be attached by garnishment in a suit at law, and thus a court of law will become invested with cognizance of equitable rights, and therefore bound to ascertain and condemn them, however difficult the task may be, or however incompetent the powers of the court for this purpose.[1]

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Thus, where a garnishee was sought to be charged on the ground that he was indebted to the defendant in respect of a partnership which had existed between them, but the accounts of which had not been settled, it was held, that the proceeding could not be sustained; that the partnership accounts could not be settled in that way, but only in equity.[2]

§ 458. A fundamental doctrine of garnishment is, that the plaintiff does not acquire any greater rights against the garnishee than the defendant himself possesses. When, therefore, the at-

[1] Harrell *v.* Whitman, 19 Alabama, 135; Thomas *v.* Hopper, 5 Ibid. 442; Hoyt *v.* Swift, 13 Vermont, 129; May *v.* Baker, 15 Illinois, 89; Perry *v.* Thornton, 7 Rhode Island, 15; Clarke *v.* Farnum, Ibid. 174.

[2] Burnham *v.* Hopkinson, 17 New Hamp. 259; Treadwell *v.* Brown, 41 Ibid. 12. Nor can the garnishment of one partner in an action against his copartner, authorize the attaching plaintiff to maintain a bill in equity against the latter for an account, so as to reach the debtor's interest in the partnership. Treadwell *v.* Brown, 43 New Hamp. 290.

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tachment plaintiff seeks to avail himself of the rights of the defendant against the garnishee, his recourse against the latter must of necessity be limited by the extent of the garnishee's liability to the defendant. This principle is subject, however, to an exception, where the garnishee is in possession of effects of the defendant under a fraudulent transfer from the latter. There, though the defendant would have no claim against the garnishee, yet a creditor of the defendant can subject the effects in the garnishee's hands to his attachment.[1]

§ 459. The plaintiff's right to hold a garnishee, exists only so long as, in the suit in which the garnishment takes place, he has a right to enforce his claim against the defendant. When his remedy against the latter is at an end, so is his recourse against the garnishee. That the latter may show that the plaintiff's right against him has been thus terminated, cannot be doubted. Thus, where one was garnished under an execution, he was permitted to show by a previous execution in the same case that the defendant had satisfied the judgment.[2]

§ 460. As the whole object of garnishment is to reach effects or credits in the garnishee's hands, so as to subject them to the payment of such judgment as the plaintiff may recover against the defendant, it results necessarily that there can be no judgment against the garnishee, until judgment against the defendant shall have been recovered.[3]

§ 461. In order to a recovery against a garnishee, it must be *shown affirmatively*, either by his answer or by evidence *aliunde*, that he has property of the defendant in his possession, of a description which will authorize his being charged, or that he is

[1] Lamb *v.* Stone, 11 Pick. 527. This was an action on the case by a creditor against a person to whom it was alleged the debtor had made a fraudulent sale of his property. The court held, that the action could not be maintained, because, 1. If the sale was fraudulent, the property was liable to attachment, after, as well as before, the sale; and 2. If the property could not be come at to be attached specifically, it might be reached in the purchaser's hands by garnishment. See United States *v.* Vaughan, 3 Binney, 394.

[2] Thompson *v.* Wallace, 3 Alabama, 132; Price *v.* Higgins, 1 Littell, 274.

[3] Gaines *v.* Beirne, 3 Alabama, 114; Leigh *v.* Smith, 5 Ibid. 583; Lowry *v.* Clements, 9 Ibid. 422; Bostwick *v.* Beach, 18 Ibid. 80; Case *v.* Moore, 21 Ibid. 758; Caldwell *v.* Townsend, 5 Martin, N. S. 307; Proseus *v.* Mason, 12 Louisiana, 16; Housemans *v.* Heilbron, 23 Georgia, 186; Rose *v.* Whaley, 14 Louisiana Annual, 374.

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indebted to the defendant. The law will not presume him liable, nor will he be required to show facts entitling him to be discharged, until at least a *primâ facie* case is made out against him. On the contrary, the rule is the other way, that he will be entitled to be discharged, unless enough appear to render him liable. In this respect he stands precisely in the position he would occupy if the defendant had sued him. A dictum of PARSONS, C. J., in 1807, very proper as applied to the case before him, but wholly erroneous as a general principle, — that "the trustees must be holden, unless sufficient matter appears in their answers to discharge them,"[1] created and kept alive in Massachusetts, for many years, a misconception of the true position of a garnishee, and of the principles upon which he should be held liable. Recently, however, the Supreme Court of that State, in an elaborate opinion, traced the rise and progress of that misconception, and finally settled the rule that the garnishee's liability should be affirmatively shown.[2]

§ 462. It is an invariable rule, that under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be in, if the defendant's claim against him were enforced by the defendant himself. This is necessary, in order to protect the garnishee's rights, as between him and the defendant, and to enable the garnishee to defend against a suit which the defendant might bring against him on the same liability for which he may have been held as garnishee.

§ 462 *a*. In some States, statutory authority is given, for the garnishment of one who is bound by contract to deliver goods or chattels to the defendant; and for the delivery thereof to the officer holding the execution in the case, in discharge of the garnishee's liability. In such case the garnishee cannot be charged, if his contract was to deliver the goods in another State; for the officer holding the execution has no authority to go there for them, or to receive them there.[3]

[1] Webster *v.* Gage, 2 Mass. 503.

[2] Porter *v.* Stevens, 9 Cushing, 530. See Lomerson *v.* Huffman, 1 Dutcher, 625; Williams *v.* Housel, 2 Iowa, 154; Hunt *v.* Coon, 9 Indiana, 537; Reagan *v.* Pacific Railroad, 21 Missouri, 30; Lane *v.* Felt, 7 Gray, 491; Driscoll *v.* Hoyt, 11 Ibid. 404.

[3] Clark *v.* Brewer, 6 Gray, 320.

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§ 463. As to the general basis of a garnishee's liability, it will be found, on examination, that whatever else may, under particular statutes, authorize his being charged, there are two comprehensive grounds, common to every attachment system, viz. 1. His possession, when garnished, of personal property of the defendant, capable of being seized and sold on execution; and, 2. His liability, *ex contractu*, to the defendant, whereby the latter has, at the time of the garnishment, a cause of action, present or future, against him. With such exceptions and modifications as are hereinafter presented, these are the fundamental grounds of a garnishee's liability, in all the garnishment systems of England and the United States.

The terms of the different State laws prescribing the garnishee's liability are set forth in the Appendix; where it appears that in some States he may be charged in respect of real estate of the defendant in his hands; and in some, on account of *choses in action;* but aside from such special provisions, the language used in defining his liability, though varied, and often cumulative, will, on examination, be found to resolve itself, in each case, into those two general grounds; which may be considered as fully embraced in any system which provides no more than that one having "*goods, effects, or credits*" of the defendant in his possession may be charged as his garnishee. The addition of the word "money," or "chattels," or "property," or "rights," which is frequently found, or that of all of them, is not conceived to enlarge, in legal construction, the basis afforded by the comprehensive terms, "goods, effects, or credits." Hence the general applicability of the decisions in Massachusetts and Maine, where, under statutes using those words, it has been uniformly held, that, to charge a garnishee, the defendant must either have a cause of action against him, or the garnishee must have in his possession personal property belonging to the defendant, capable of being seized and sold on execution.[1] And the same rule prevails in New Hampshire and Vermont, where "any person having in his possession money, goods, chattels, rights, or credits" of the defendant, may be charged as garnishee.[2] And where this posses-

[1] Maine F. & M. Ins. Co. *v.* Weeks, 7 Mass. 438; White *v.* Jenkins, 16 Ibid. 62; Brigden *v.* Gill, Ibid. 522; Rundlet *v.* Jordan, 3 Maine, 47.

[2] Haven *v.* Wentworth, 2 New Hamp. 93; Adams *v.* Barrett, Ibid. 374; Piper *v.* Piper, Ibid. 439; Greenleaf *v.* Perrin, 8 Ibid. 273; Paul *v.* Paul, 10 Ibid. 117; Getchell

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sion exists, the possessor cannot escape the operation of the garnishment on the ground that the property for which it is sought to charge him might have been attached by levy.[1]

§ 464. The rule, as just stated, is qualified, in the case before referred to, of the garnishee's possession of effects of the defendant under a fraudulent transfer,[2] and is also subject to exceptions. For instance, where the garnishee has in his possession property which, when he is summoned, could not be seized under attachment or execution, because not removable without material injury to it, — as hides in the process of tanning, — he may nevertheless be charged as garnishee in respect of such property, because he can hold it until it be in a condition to be delivered on execution.[3] So, an attorney at law, who has collected money for his client, may be held as garnishee of the client, though the latter have made no demand of payment, without which he could maintain no action against the attorney.[4] So, a person indebted to two jointly, either on implied assumpsit,[5] or by note,[6] may be charged as garnishee of one of his creditors, though that one could not maintain an action against him without joining his co-creditor. So where the garnishee is, when summoned, a debtor

v. Chase, 37 Ibid. 106; Hutchins v. Hawley, 9 Vermont, 295; Hoyt v. Swift, 13 Ibid. 129.

[1] Brown v. Davis, 18 Vermont, 211.

[2] Ante, § 458.

[3] Clark v. Brown, 14 Mass. 271.

[4] Staples v. Staples, 4 Maine, 532; Woodbridge v. Morse, 5 New Hamp. 519; Thayer v. Sherman, 12 Mass. 441; Riley v. Hirst, 2 Penn. State, 346; Mann v. Buford, 3 Alabama, 312. In Corey v. Powers, 18 Vermont, 588, WILLIAMS, C. J., said: "It is objected that no action could have been maintained by the debtor against the trustee, without a previous demand, and that because no such demand was found in the case, the trustee should not have been held chargeable. It is not necessary, to constitute this relation of debtor and trustee, that a right of action should actually exist and be perfected in the debtor, at the commencement of the trustee process. It is sufficient, if property is deposited with the trustee, or that he is indebted to the principal debtor, though something further may be requisite, to constitute a right of action therefor." In Quigg v. Kittredge, 18 New Hamp. 137, the court said: "Actions cannot be maintained by the party entitled, against attorneys, sheriffs, agents, &c., who have moneys in their hands, collected, until a demand has been made. So, bailees are not answerable, in many cases, until there has been a demand. So, administrators of insolvent estates cannot be charged until demand, after a dividend has been declared, nor administrators generally, for the share of an heir. But they may be charged as trustees, although there has been no demand. The reason is, that the process of foreign attachment is not regarded as an adverse suit, as against the trustee. Instead of being subjected to costs, he recovers costs, and these are regarded as an indemnity."

[5] Whitney v. Munroe, 19 Maine, 42.

[6] Miller v. Richardson, 1 Missouri, 310.

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of the defendant, but the debt is payable at a future time: though the defendant, at the time of the garnishment, can maintain no action against the garnishee, yet the latter may be charged. Thus, where a savings bank was garnished, and at the time had money of the defendant on deposit, which, by the terms of its charter, could be withdrawn by him only at certain designated times, and after a week's notice, and upon the production of his pass-book, or satisfactory evidence of its loss, none of which requirements had been met by the defendant before the garnishment took place, and therefore he then had no cause of action against the bank; it was held, that the bank was, nevertheless, chargeable as garnishee.[1]

§ 465. Still the rule as stated may be considered generally applicable, and it follows thence, that, without express statutory warrant, one cannot be made liable as garnishee in respect of real estate of the defendant in his possession, and it has been so held in several instances. In Maine,[2] Massachusetts,[3] and Connecticut,[4] where the possession of "goods, effects, or credits" of the defendant, by the garnishee, is the criterion of the garnishee's liability, real estate is not considered to come within the meaning of those terms. In New Hampshire[5] and Vermont,[6] under statutes basing the liability of the garnishee on his possession of "money, goods, chattels, rights, or credits," the same doctrine is held.

Therefore, where A., when about to abscond, fraudulently executed a note to B., and a mortgage to secure the payment of the note, and B. was subsequently garnished, the court said: "The lands mortgaged are not effects within the statute, because the mortgage being fraudulent as to creditors, the lands mortgaged may be taken in execution, either by the plaintiff or by any other creditor. And it has long been settled that where lands are fraudulently conveyed by a debtor, the grantee is not thereby a trustee

[1] Nichols *v.* Scofield, 2 Rhode Island, 123. See Clapp *v.* Hancock Bank, 1 Allen, 394.

[2] Moor *v.* Towle, 38 Maine, 133; Stedman *v.* Vickery, 42 Ibid. 132; Plummer *v.* Rundlett, Ibid. 365.

[3] How *v.* Field, 5 Mass. 390; Dickinson *v.* Strong, 4 Pick. 57; Ripley *v.* Severance, 6 Ibid. 474; Gore *v.* Clisby, 8 Ibid. 555; Bissell *v.* Strong, 9 Ibid. 562. See Seymour *v.* Kramer, 5 Iowa, 285.

[4] Risley *v.* Welles, 5 Conn. 431.

[5] Wright *v.* Bosworth, 7 New Hamp. 590.

[6] Baxter *v.* Currier, 13 Vermont, 615.

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for creditors, because, as to them, the conveyance is void, and the lands are liable to their executions, without the assent or exposure of the grantee. If he was holden a trustee to the value of the lands, after having paid one creditor that value, another creditor might by his execution take the lands from him, and thus he would in effect be charged with the value without any consideration."[1]

So, where an insolvent debtor had assigned personal and real property for the payment of certain debts, and the assignee was garnished, he was held not liable in respect of the real estate; the court basing its judgment on the following grounds: "There are great difficulties in charging the assignee, by the trustee process, on account of the real estate so conveyed. Indeed, the provisions of the statute cannot be executed upon it, according to the intention of the legislature, nor can real property thus situated be brought within any technical definition of the words of the statute which designate the objects of the process. Land is neither goods, effects, nor credits; neither is the assignee indebted to the assignor on account of it. If this difficulty could be overcome by giving a broader signification to the term *effects* than is usually assigned to it, there are other difficulties which are quite insuperable. The sixth section of the statute provides that the trustee, when judgment is rendered against the principal, and against his goods and effects in the hands of the trustee, may discharge himself by exposing the goods and effects of the principal to the officer who has the execution; and the officer may then seize and sell them as the property of the principal. This is wholly inapplicable to land; which cannot be considered as the principal's while the legal title is in the assignee. And then the form of the execution provided in the statute manifestly shows that real estate was not in the

[1] How *v.* Field, 5 Mass. 390. In Hunter *v.* Case, 20 Vermont, 195, it was attempted to subject a garnishee to liability on account of real estate held by him under a conveyance which was void as to creditors. The statutory provision bearing on the case was, that, if the person summoned as trustee should have in his possession any *goods, effects, or credits* of the principal defendant, which he holds by a conveyance, or title, that is void as to the creditors of the principal defendant, he may be adjudged trustee on account of such goods, effects, or credits, although the principal defendant could not maintain an action therefor against him. BENNETT, J., in delivering the opinion of the court, said: "There can be no pretence that real estate can be brought within the statute, unless, indeed, within the term *effects*. Certainly it is not *goods* or *credits*. It is not within the popular meaning of the term *effects*. That word, as ordinarily used, is understood to mean *goods, movables, personal estate;* and I am not aware that the word *effects* has even been defined by any legal writer as including real estate."

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contemplation of the legislature, as a subject of the process. It requires the sheriff, for want of goods, chattels, or *lands* of the principal in his own hands and possession, or of *goods*, *effects*, and *credits* in the hands of the trustees, to be by them discovered and exposed, to take the body of the principal, &c. Now land conveyed to the assignee by a *bonâ fide* deed cannot be considered as in the hands or possession of the principal, nor can it be considered as goods, effects, or credits in the hands of the trustee."[1]

The reasons here given, though referring principally to the statute of Massachusetts, yet have a general applicability; as in most if not all the States, a garnishee may discharge himself from liability in respect of property of the defendant in his hands, by delivering it to the officer. Wherever this is the case, it would seem to follow that a garnishee should not be charged in respect of property which he cannot so deliver, and, therefore, not in respect of real estate. But, aside from statutory provisions, it is sufficient that, if the conveyance to the garnishee be *bonâ fide*, he has no property of the defendant in his possession, and if it be fraudulent, the property is subject to the execution against the defendant, without any disclosure by the garnishee; and that the garnishee if made liable by one creditor for the value of the land, may afterwards lose the land by a sale under another creditor's execution.

But though a garnishee may not be charged in respect of real estate of the defendant in his possession, we shall hereafter see that he may be, on account of liabilities growing out of the possession of such property.

§ 465 *a*. The whole scope of the doctrines stated in the preceding sections of this chapter would seem to indicate clearly that garnishment is a proceeding against *third persons;* that is, persons who do not stand in such relation to the defendant, as that their garnishment is, in fact, but the garnishment of the defendant himself. And this, doubtless, is the object of the proceeding under the custom of London; where, "if the plaintiff will surmise that *another person* within the city is a debtor to the defendant in any sum, he shall have garnishment against him."[2] But attempts have been made to garnish individuals, where to do so was in re-

[1] Gore *v.* Clisby, 8 Pick. 555; Chapman *v.* Williams, 13 Gray, 416.
[2] Ante, § 1.

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ality to garnish the defendant; as, for instance, a toll-gate keeper of a turnpike road, and a ticket agent of a railroad; and the question has arisen, whether in such cases the proceeding can be maintained. Upon principle, it seems that it cannot. They are not third persons, so far as their relations to the defendant are concerned; but are, in effect, the defendant himself. Their possession of the defendant's money is his possession. He can have no right of action against them until a demand made upon them for the money, and their failure to pay it. They occupy the same position toward him as a cashier does toward a bank, a cash clerk toward a merchant, a treasurer toward a municipal corporation; simply custodians of the defendant's money, under his immediate supervision and control. Still, in the case of a toll-gate keeper, it was held in Alabama, that he could be charged as garnishee of the company for which he collected tolls.[1] The same question came up in Pennsylvania, in the case of a ticket agent of a railroad company, employed at the company's office to sell tickets to passengers; and the court held, that he could not be garnished. "The purpose of an attachment," said the court, "is to reach effects of a defendant in the hands of third persons. Here, the defendant is a corporation, — a railroad company. Are its ticket agents to be treated as third persons, so far as regards money received by them on the sale of tickets to passengers? We think not. We suppose that the case speaks of the ordinary ticket agents employed at the offices of the company; and of these we speak. *These are the very hands of the company;* it cannot do its business without them; and if an attachment is to be regarded as arresting money received after its service, then it would always occasion the dismissal of such agents, in order to prevent such a result."[2]

§ 466. The further consideration of this subject will naturally lead to its arrangement in two general divisions: 1. The liability of a garnishee in respect of property of the defendant in his possession; and, 2. His liability as a debtor of the defendant.

§ 467. On the first point it may be remarked, that it will often happen that a person garnished may have personal property of the

[1] Central Plank-Road Co. *v.* Sammons, 27 Alabama, 380.
[2] Fowler *v.* Pittsburg, F. W. & C. R. R. Co., 35 Penn. State, 22.

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defendant in his possession, and yet not be liable as garnishee. Various considerations determine the question of liability, not only as to the nature of the property, but as to the circumstances under which it is held. The property may not be such as is contemplated by the rule above declared, or by the particular statute under which the individual is garnished; or his possession of it may not be such as to make him liable; or the capacity in which he holds it may exempt him from liability; or there may be contracts in reference to it which forbid his being charged. Many such questions have arisen, eliciting acute discussion and learned adjudication. We propose, therefore, after first considering who may be subjected to garnishment, to treat of the liability of a garnishee, in respect of personal property of the defendant in his hands, under the following heads: —

I. What personal property of the defendant in the garnishee's possession will make the garnishee liable.

II. The character of the possession of personal property by a garnishee, which will be sufficient to charge him.

III. The garnishee's liability, as affected by the capacity in which he holds the defendant's property.

IV. The garnishee's liability, as affected by previous contracts touching the defendant's property in his hands.

V. The garnishee's liability, as affected by a previous assignment of the defendant's property in his hands, or by its being subject to a lien, mortgage, or pledge.

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CHAPTER XIX.

WHO MAY BE GARNISHED. — CORPORATIONS. — NON-RESIDENTS.

§ 468. As a general proposition, irrespective of the ulterior question of liability, all persons are subject to garnishment. But there have arisen questions of importance connected with the character and *status* of the garnishee, which it is proper to consider, before proceeding to the more extended field of inquiry in regard to his liability. Those questions are connected, 1. with the garnishment of corporations, and, 2. with that of persons residing out of the State in which the attachment is obtained. The consideration of these points will form the subject of the present chapter.

§ 469. As to corporations, provision is usually made by statute for their garnishment. So far as such provisions are concerned, they need not be here discussed. But where such do not exist, can a corporation be summoned as garnishee, under general enactments, *primâ facie* applicable to natural persons only? This subject was fairly presented before the Supreme Court of Connecticut,[1] and that of Iowa,[2] the Court of Appeals of Maryland,[3] and that of Virginia,[4] by all of which it was held — as doubtless would

[1] Knox *v.* Protection Ins. Co., 9 Conn. 430.

[2] Wales *v.* Muscatine, 4 Iowa, 302; Taylor *v.* Burlington & Mo. R. R. Co., 5 Ibid. 114.

[3] Boyd *v.* Chesapeake & Ohio Canal Co., 17 Maryland, 195.

[4] Baltimore & Ohio R. R. Co. *v.* Gallahue, 12 Grattan, 655. From the opinion of the court the following remarks are presented: "The next error assigned is, that the court erred in overruling the motion to discharge the attachment; the plaintiff in error insisting that a corporation is not liable as a garnishee, under the attachment laws. The objection is general; applicable to all corporations aggregate, without reference to the jurisdiction of the court over the parties or controversy. The Code, ch. 151, § 2, authorizes the plaintiff in an action at law, on proper affidavit, to obtain an attachment. The 7th section provides that every such attachment may be levied on any estate, real or personal, of the defendant; and that it shall be sufficiently levied by the service of a copy thereof on such persons as may be in possession of effects of, or known to be indebted to, the defendant. By the 9th section, such persons are to be summoned to appear as garnishees. The 12th section gives a lien from the time of service, upon the personal property, choses in action, and other securities of the defendant, in the hands of, or due from, any such garnishee. The 17th section provides that when any garnishee appears he shall be examined on oath. If it appear on such examination, that he was indebted, the court may order him to pay the amount so due by him; or with

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be held elsewhere — that, though not mentioned in the statute as the subject of garnishment, a corporation is liable thereto, in the same manner as a natural person.

§ 470. Whatever may be the statutory mode of serving an attachment on a corporation as a garnishee, a service in a mode authorized and requested by the president and directors of the corporation will be binding on it. It was so held, where those officers requested that notices of garnishment should be delivered to one of the clerks of the corporation.[1] But care should be taken

the leave of the court he may give bond to pay the amount due by him at such time and place as the court may thereafter direct. The 18th section authorizes the court, if he fails to appear, to compel him to appear, or the court may hear proof of any debt due by him to the defendant, and make the proper order thereupon. And the 19th section authorizes a jury to be impanelled when it is suggested that the garnishee has not fully disclosed the debts due by him to, or effects in his hands of, the defendant; and provides for a judgment on the finding of the jury.

"From this review of the material provisions of the statute bearing upon this question, there would seem to be nothing in the condition of a corporation to exempt it from being summoned as a garnishee. When the word person is used in a statute, corporations as well as natural persons are included for civil purposes. This was the rule at common law. They are to be deemed and taken as persons, when the circumstances in which they are placed are identical with those of natural persons expressly included in such statutes. And the Code provides that the word person may extend and be applied to bodies politic and corporate as well as individuals. The general words as to what effects, debts, or estate of the defendant may be attached, would seem to embrace his whole estate, without respect to the character of the person, natural or artificial, in whose hands the effects were, or by whom the debt was due. The corporation stands in precisely the same position in regard to such effects or debts, as a natural person. If it owes the debt or holds the effects of another, it, like an individual, is liable to be sued by its creditor or the owner of the property: and the statute merely substitutes the plaintiff in the attachment to the rights of the creditor or owner as against the garnishee. No change is made in its contract, or additional obligation imposed on it, by being proceeded against as garnishee. The only particular in which there is any departure from a literal compliance with the statute, is in regard to that provision of the 17th section which declares that when any garnishee shall appear, he shall be examined on oath. This clause was for the benefit of the plaintiff in the attachment. In the case of a corporation, he must receive an answer in the only mode in which the corporation can answer, under its corporate seal. In chancery, where, as a general rule, all answers must be verified by oath or affirmation, a corporation must answer in the same way, though where a discovery is wanted, a practice has prevailed of making some of the officers defendants. The same result could be arrived at under the attachment law, by examining the officers as witnesses, if the plaintiff suggests that a full disclosure has not been made. This is an inconvenience to which he is subjected, growing out of the character of the garnishee, but furnishes no reason for exempting the corporation from being so proceeded against, when all the other words of the statute are sufficiently comprehensive to embrace artificial as well as natural persons. The mischief intended to be remedied applies as well to debts due by them as by individuals; and the circumstances in which they are placed are the same as those of others embraced in the statute. A fair construction of the statute authorizes the proceeding against the corporation in a proper case."

[1] Davidson v. Donovan, 4 Cranch, C. C. 578.

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that there be in reality a service on the corporation. The notice of garnishment may be served on its officers, but not be a service on it. Thus, where such notice was served on the Mayor, Recorder, and Treasurer of a city, informing them and each of them that they "were attached and held as garnishees of the defendant, and as persons holding property of said defendant"; it was decided to be no service on the corporation.[1] Whether, however, the service on the corporation be in conformity with the statute or not, the appearance of the corporation, and submitting to the jurisdiction of the court, and answering, obviates the defect.[2]

§ 471. The rules governing the liability of a corporation as a garnishee, do not differ from those applicable to the case of an individual. The corporation must either have personal property of the defendant in its possession, capable of being seized and sold under execution, or be indebted to him. Neither of these conditions is fulfilled by the mere fact of the defendant being a stockholder in the corporation; and the corporation cannot be charged as his garnishee on that account.[3]

§ 472. Different views are entertained as to the manner in which a corporation shall answer as garnishee. In Virginia and South Carolina, it must answer through its chief officer and under its common seal.[4] In Alabama, the same rule exists, with the further requirement, that, if the seal be used by another than the chief officer, it should appear to have been by the express authority of the directors. It was therefore held, that an answer of a corporation put in by its cashier, or the individual answer under oath of either a president or cashier, is not sufficient.[5]

In Illinois, on the contrary, where the statute required an answer to be sworn to in all cases, it was held, that an answer of a corporation, signed by its secretary and under its corporate seal, was not sufficient; and as the corporation could not swear, the

[1] Claflin *v.* Iowa City, 12 Iowa, 284.

[2] Harris *v.* Somerset & Kennebec R. R. Co., 47 Maine, 298.

[3] Planters & Merchants' Bank *v.* Leavens, 4 Alabama, 753; Ross *v.* Ross, 25 Georgia, 297.

[4] Callahan *v.* Hallowell, 2 Bay, 8; Baltimore & O. R. R. Co. *v.* Gallahue, 12 Grattan, 655.

[5] Branch Bank *v.* Poe, 1 Alabama, 396; Planters & Merchants' Bank *v.* Leavens, 4 Ibid 753

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oath of a proper officer or an agent of the company would be a substantial compliance with the statute.[1]

In Maine, the answer can only be made by an agent or attorney of the corporation. It need not be a general agent, but one specially authorized may act in that capacity, whether he be a member of the corporation or not.[2]

§ 473. Concerning the residence of a person, as affecting his liability to garnishment, it is well settled, that under the custom of London one cannot be charged as garnishee, unless he reside within the jurisdiction of the Lord Mayor's court.[3]

§ 474. In this country, the question has been repeatedly presented, and the uniform tenor of the adjudications establishes the doctrine, that whether the defendant reside or not in the State in which the attachment is obtained, a non-resident cannot be subjected to garnishment there, unless, when garnished, he have in that State property of the defendant in his hands, or be bound to pay the defendant money, or to deliver to him goods, at some particular place in that State.

As in many other questions in the law of attachment, Massachusetts was the first to pass upon this point, in a case where both defendant and garnishee were non-residents. The Supreme Court there said: "The summoning of a trustee is like a process *in rem*. A *chose in action* is thereby arrested and made to answer the debt of the principal. The person entitled by the contract of the supposed trustee is thus summoned by the arrest of this species of effects. These are, however, to be considered for this purpose as local, and as remaining at the residence of the debtor or person intrusted for the principal, and his rights in this respect are not to be considered as following the debtor to any place where he may be transiently found, to be there taken at the will of a third person, within a jurisdiction where neither the original creditor nor debtor resides."[4]

When the point arose again, the defendant was a resident, and

[1] Oliver *v.* C. & A. R. R. Co., 17 Illinois, 587.

[2] Head *v.* Merrill, 34 Maine, 586.

[3] 1 Saunders's R. 67, Note *a;* Tamm *v.* Williams, 2 Chitty's R. 438; s. c. 3 Douglass, 281; Crosby *v.* Hetherington, 4 Manning & Granger, 923; Day *v.* Paupierre, 7 Dowling & Lowndes, 12; s. c. 13 Adolphus & Ellis, N. S. 802.

[4] Tingley *v.* Bateman, 10 Mass. 343; Nye *v.* Liscomb, 21 Pick. 263.

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the garnishee a non-resident, and the court maintained its previous position.[1] The same ground has been taken in Maine, New Hampshire, Vermont, Connecticut, and New York, and by the United States Circuit Court for the District of Columbia.[2]

[1] Ray *v.* Underwood, 3 Pick. 302; Hart *v.* Anthony, 15 Ibid. 445.

[2] Lovejoy *v.* Albee, 33 Maine, 414; Jones *v.* Winchester, 6 New Hamp. 497; Sawyer *v.* Thompson, 4 Foster, 510; Baxter *v.* Vincent, 6 Vermont, 614; Green *v.* Farmers & Citizens' Bank, 25 Conn. 452; Bates *v.* New Orleans, &c. R. R. Co., 4 Abbott Pract. R. 72; Willet *v.* Equitable Ins. Co., 10 Ibid. 193; Miller *v.* Hooe, 2 Cranch, C. C. 622. In Sawyer *v.* Thompson, the grounds taken by the Superior Court of New Hampshire were as follows: "The present is an attempt to charge the trustee for a chose in action, which is in the law regarded as local in reference to this action. The indebtedness attempted to be reached is between parties resident in other jurisdictions, who have never been domiciled within this State, payable, and to be discharged in the foreign jurisdiction. But it is well settled that a chose in action is not reached by the trustee process, under circumstances like the present. It is regarded as having a *situs* and locality where the party resides. The payment cannot be enforced within this jurisdiction, by this process, of a debt due from a debtor residing in another State, and payable in that jurisdiction. A chose in action, in reference to the foreign process, stands precisely upon the same ground as chattels of the principal debtor, found in the possession of the trustee, located and deliverable to him in another State. The trustee is no more answerable for the chose in action, payable in the foreign jurisdiction, than for the goods that are located there. No lien is created by the service of the process upon either. Both classes of property are equally local. To compel a performance of the contract in reference to either class of property, in a jurisdiction different from that of the stipulated performance, would be to allow a creditor of the principal debtor to enforce a contract in a manner different from its legal effect and from the agreement of the parties."

In Vermont, in Baxter *v.* Vincent, *ut supra*, the matter arose in such a shape as to involve the construction of three statutes, passed in 1797, 1817, and 1830, the last two of which seemed to require the garnishee to be a resident of the State, while the first did not. The following portions of the opinion of the court discuss other points than those embraced in the cases cited from Massachusetts and New Hampshire. The court say: "It should be borne in mind, that the proceeding against the trustee is not an original or distinct action. The direct suit is between the creditor and principal debtor, and this is but a species of attachment, incidental to that suit, and dependent upon it. And hence the general rule, that any person coming into this State is allowed to institute, or may be holden to defend, a transitory personal action, is not conclusive of the question. The object of these statutes is to furnish a remedy against the funds and effects of the debtor, when, in consequence of his having concealed himself, or being beyond the reach of ordinary process, the usual remedies cannot be enforced against him personally. And the course pointed out, to bind the effects for the benefit of the creditor, has been considered as somewhat analogous to proceedings *in rem*, while in the mode of trial it has been likened to a hearing in chancery. A judgment in relation to the effects, whether it be for or against the trustee, is not understood to have the effect of an adjudication as between him and the principal debtor. If the trustee is made liable as such, he is protected against the principal debtor, only to the amount for which he is so charged in favor of the creditor; — or, in other words, a payment to the creditor in obedience to this process is legalized, *pro tanto*, as if made to the principal debtor.

"The statutes evidently presuppose such a jurisdiction over the trustee, that, ordinarily, their provisions may be carried into full execution against him, by the means which they have provided. But these means must prove very inadequate to their object, when neither the trustee nor the effects can be reached, by the first execution,

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§ 475. This doctrine, however, as previously intimated, does not apply, where the garnishee has in his hands, in the State in which he is summoned, property of the defendant, or has contracted to pay money or deliver goods to the defendant at some particular place in that State. In regard to this condition of things, the Superior Court of New Hampshire say: "The property was attached in the trustee's hands, while in his possession, in this State. If he had not the property with him, but had left it at his residence, it could not be said that it was attached here; but having it with him, we see no reason why it might not be attached in this way, as well as if it had been visible personal property of the defendant's, and taken by the officer. If the trustee had brought into this State the goods and chattels of the defendant, and had himself no special property in them which might give him the power to remove them from the State, they could, no doubt, have been attached and held on a writ against the defendant; and it appears to us that no well-founded distinction can be pointed out between such a case and one where the trustee has about his person, at the time the writ is served upon him, the money and notes of the defendant."[1]

§ 476. The exemption from garnishment on account of non-residence is not to be pushed beyond the reason of the rule, which rests upon the idea that the property or debt sought to be reached is without the jurisdiction of the court, and, for that reason, incapable of being subjected to its process. Therefore, if several joint debtors be garnished, part of whom are residents and part non-residents, the jurisdiction will extend to all, in virtue of the residence of those within the State. This was decided in Vermont, under a statute which provided "that no person shall be summoned as trustee, unless, at the time of the service of the writ he resides in this State." Four persons, members of

nor the trustee served with the necessary process, preparatory to the second and conclusive judgment against him. And although this consideration might have less weight in those cases where execution is authorized directly against the trustee in the first instance, yet, as such a case is not to be anticipated, but depends upon the nature of his accountability to the principal debtor, which can only appear by the disclosure or other evidence on trial, the distinction furnishes no aid upon a preliminary question of jurisdiction. If, therefore, the question rested solely upon the statute of 1797, we should incline to decide, that none but persons resident in this State could properly be holden as trustees."

[1] Young *v.* Ross, 11 Foster, 201.

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a firm existing in the State, were summoned as garnishees, two of whom were residents of the State of New York. It was claimed that none of them were chargeable, because the two non-residents being specially excepted from the act, all the members of the firm were likewise excepted, as none were liable to be prosecuted on the joint claim unless all were, or could be made, legal parties to the record. But the court held, that the statute applied only to cases where all the garnishees resided in another State, and not to a case where some of them were residents of Vermont, where the partnership was formed and had its place of business; and that, if the effects in their hands are considered local, and as remaining at the residence of the garnishee, they must be regarded as remaining where the partnership was formed, its business transacted, and two of its members resided.[1]

§ 477. The principles which would exempt non-residents from garnishment produce the same result in the case of a foreign corporation. This was so determined in Massachusetts, though the officers of the corporation resided, and its books and records were kept, in that State, and though the statute there declares that "all corporations may be summoned as trustees." The very generality of the terms is considered to require some qualification. "It cannot," said the court, "be construed literally all corporations, in whatever part of the world established and transacting business. The answer is to be found in the statutes *in pari materia* then existing. The statute in question was only an extension of an existing system. It was intended, we think, to put corporations on the same ground as individuals. And it is well settled that an individual, an inhabitant of another State, is not chargeable by the trustee process, although found in this commonwealth, and here served with process. In the case of corporations which have no local habitation, the principle is this: if established in this commonwealth, by the laws thereof, they are inhabitants of this commonwealth, within the meaning of the law; but if established only by the laws of another State, they are foreign corporations, and cannot be charged by the trustee process."[2] The same views have been expressed in New Hampshire.[3]

[1] Peck *v.* Barnum, 24 Vermont, 75.

[2] Danforth *v.* Penny, 3 Metcalf, 564; Gold *v.* Housatonic Railroad Co., 1 Gray, 424; Bradford *v.* Mills, 5 Rhode Island, 393.

[3] Smith *v.* B. C. & M. Railroad, 33 New Hamp. 337.

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But in Pennsylvania, a foreign railroad corporation was held as garnishee, where it had accepted from that State the privilege of extending its road through one of the counties thereof, coupled with a provision in the act granting the privilege, which required the company "to keep at least one manager, toll-gatherer, or other officer, a resident in the county"; on whom service of process "in all suits or actions which may be brought against said company," was declared to be "as good and available in court as if made on the president thereof."[1] And in Missouri, under a statute which provided that "notice of garnishment shall be served on a corporation, in writing, by delivering such notice, or a copy thereof, to the president, secretary, treasurer, cashier, or other chief or managing officer of such corporation," it was held, that a foreign insurance company, having an agency in that State, might be garnished, by serving the notice upon the agent; who, for that purpose, would be regarded as a "managing officer," within the meaning of the statute.[2] But where an agent upon whom the process is served is a non-resident, and when served is only casually in the State, no attachment of the debt is effected.[3]

§ 478. Where, as is sometimes the case, a corporation is chartered by two or more States, it is not in any of those States a foreign corporation, and may be subjected to garnishment in any of them, though its office and place of business be not in the State in which the garnishment takes place.[4]

[1] Jones *v.* New York & Erie R. R. Co., 1 Grant, 457; Fithian *v.* New York & Erie R. R. Co., 31 Penn. State, 114.

[2] McAllister *v.* Penn. Ins. Co., 28 Missouri, 214.

[3] Willet *v.* Equitable Ins. Co., 10 Abbott Pract. R. 193.

[4] Baltimore & Ohio R. R. Co. *v.* Gallahue, 12 Grattan, 655; Smith *v.* B. C. & M. Railroad, 33 New Hamp. 337. See Sprague *v.* Hartford, P. & F. R. R. Co., 5 Rhode Island, 233.

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CHAPTER XX.

WHAT PERSONAL PROPERTY IN THE GARNISHEE'S HANDS WILL MAKE HIM LIABLE.

§ 479. THE rule that the personal property in the garnishee's hands, in respect of which he may be charged, must be such as is capable of being seized and sold on execution, results from the consideration that he should be at liberty, if he wish, to discharge himself from pecuniary liability, by delivering the property into the custody of the tribunal before which he is summoned; and therefore, that he should not be charged for that which, if so delivered, could not be sold under execution. Therefore, where a garnishee admitted that, when summoned, he had in his possession a horse of the defendant's, but showed that the horse was by law exempt from execution against the defendant, he was held not to be chargeable.[1] This rule applies to the proceeds, in money, of exempted real estate sold under execution, under a statute authorizing such to be awarded to a debtor in lieu of the property;[2] and also to money recovered by a debtor for the value of property exempt from execution, which had been seized and sold.[3] But if the owner of property so exempt sell the same, the debt due him therefor may be attached.[4]

The garnishee, in such cases, may object to such property being held by the attachment, though the defendant do not raise the question;[5] for if the former know of the exemption, and fail to bring it to the notice of the court, and thereby be charged as garnishee, the judgment will be no protection to him.[6]

[1] Davenport *v.* Swan, 9 Humphreys, 186; Staniels *v.* Raymond, 4 Cushing, 314. Where one held a certificate of shares of stock in a bank in another State, in favor of the defendant, it was held, that he could not be charged as garnishee in respect thereof; because the court could not subject either the certificate or the stock to its execution. Christmas *v.* Biddle, 13 Penn. State, 223. See Deacon *v.* Oliver, 14 Howard Sup. Ct. 610.

[2] Gery *v.* Ehrgood, 31 Penn. State, 329.

[3] Stebbins *v.* Peeler, 29 Vermont, 289.

[4] Scott *v.* Brigham, 27 Vermont, 561; Knabb *v.* Drake, 23 Penn. State, 489.

[5] Clark *v.* Averill, 31 Vermont, 512.

[6] Lock *v.* Johnson, 36 Maine, 464.

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§ 480. By the custom of London, attachment may be made of boxes or trunks locked, and the court, after four several defaults of the owner, gives judgment that they be opened. In Massachusetts it was decided that no such law or custom existed in that State. There a bank and its president were summoned as garnishees, and it appeared that the defendant had deposited in the vault of the bank, as a place of safe keeping merely, a small trunk, of the contents of which no officer of the bank knew anything, and they had no right to open it. The court held the garnishees not liable, because it was not shown that the trunk contained attachable effects, and no presumption was admissible in the case.[1]

§ 481. It has been uniformly held, that one having in his possession promissory notes, or other *choses in action* of the defendant's, cannot in respect thereof be charged as garnishee.[2] Therefore, where it appeared from the garnishee's answer that he had become security for the defendant, and that the defendant, in order to indemnify him, had placed in his hands certain notes of third persons, the property of the defendant, it was held, that the notes, not being personal property capable of being seized and sold on execution, the garnishee was not liable; and that it made no difference whether the proceeds of the notes were necessary or not for the indemnification of the garnishee.[3] So, where the garnishee disclosed that he held a certain amount of the notes or bills of the Hillsborough Bank, which had been presented for payment and refused, and which belonged to the defendant, it was decided that such bills or notes were nothing more than

[1] Bottom *v.* Clarke, 7 Cushing, 487.

[2] Maine F. & M. Ins. Co. *v.* Weeks, 7 Mass. 438; Perry *v.* Coates, 9 Ibid. 537; Dickinson *v.* Strong, 4 Pick. 57; Andrews *v.* Ludlow, 5 Ibid. 28; Lupton *v.* Cutter, 8 Ibid. 298; Gore *v.* Clisby, Ibid. 555; Guild *v.* Holbrook, 11 Ibid. 101; Hopkins *v.* Ray, 1 Metcalf, 79; Meacham *v.* McCorbitt, 2 Ibid. 352; N. H. I. F. Co. *v.* Platt, 5 New Hamp. 193; Stone *v.* Dean, Ibid. 502; Fletcher *v.* Fletcher, 7 Ibid. 452; Howland *v.* Spencer, 14 Ibid. 530; Hitchcock *v.* Egerton, 8 Vermont, 202; Van Amee *v.* Jackson, 35 Ibid. 173; Rundlet *v.* Jordan, 3 Maine, 47; Copeland *v.* Weld, 8 Ibid. 411; Clark *v.* Viles, 32 Ibid. 32; Wilson *v.* Wood, 34 Ibid. 123; Smith *v.* Kennebec & Portland R. R. Co., 45 Ibid. 547; Skowhegan Bank *v.* Farrar, 46 Ibid. 293; Fitch *v.* Waite, 5 Conn. 117; Jones *v.* Norris, 2 Alabama, 526; Marston *v.* Carr, 16 Ibid. 325; Moore *v.* Pillow, 3 Humphreys, 448; Grosvenor *v.* Farmers & Mechanics' Bank, 13 Conn. 104; Raiguel *v.* McConnell, 25 Penn. State, 362; Wilson *v.* Albright, 2 G. Greene, 125; Deacon *v.* Oliver, 14 Howard, Sup. Ct. 610; Price *v.* Brady, 21 Texas, 614; Taylor *v.* Gillian, 23 Ibid. 508.

[3] Maine F. & M. Ins. Co. *v.* Weeks, 7 Mass. 438; Dickinson *v.* Strong, 4 Pick. 57.

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promissory notes negotiable by delivery, and, being mere *choses in action*, the garnishee could not be charged in respect thereof.[1] But where a garnishee had received for the defendant bank-bills which were *current as money*, he was charged.[2] Where it appeared that the garnishee had received from the defendant the evidence of a contract made by a third person, engaging to deliver to the defendant three hundred barrels of beef described as being under Boylston Market, such contract was held to be a mere *chose in action*, and not attachable in the garnishee's hands.[3] So, where persons to whom the defendant had made an assignment, for the benefit of creditors, of goods and merchandise, book debts, promissory notes, and other *choses in action*, were garnished, under such circumstances that, if they had had goods or money in their possession they would have been liable, it was held, that, having only *choses in action*, they could not be charged.[4] So, where an assignee for the benefit of creditors had sold the assigned effects on credit, and taken notes from the purchasers, and before the maturity of the notes he was garnished, it was decided that he could not be charged.[5] So, where A. caused goods to be insured against loss by fire, and the policy provided that, in case of a loss, payment should be made to B., who held a mortgage on the goods. The goods were destroyed by fire, and immediately after,

[1] Perry *v.* Coates, 9 Mass. 537. In Massachusetts this case occurred. The Suffolk Bank was summoned as garnishee of the Nahant Bank, at a time when, under an arrangement between the two, the former had in its possession a large amount of the notes of the latter issued as a circulating medium, and which the statute of that State authorized to be attached. It appeared that the Suffolk Bank was accustomed to take up the bills of the Nahant Bank in the common course of business, to charge the amount to the latter, and from time to time to return the bills thus charged to the Nahant bank; and that to meet the amounts so charged, the Nahant Bank was accustomed to place funds with the Suffolk Bank, which went to balance the account. The question was, whether the Suffolk Bank could be charged as garnishee in respect of its possession of the bills of the Nahant Bank. The court held, that the Suffolk Bank must be considered, either, as the agent of the Nahant Bank, taking up the bills of the latter for its account out of funds provided for it or advanced by the Suffolk Bank for that purpose, — in which case, the notes, when so taken up, were no longer bills issued and circulated as money, and therefore not attachable, — or as holders of the bills on their own account, for value, and entitled to hold them as vouchers to support the charges in their account, and thus cancel and discharge the credits given by them to the Nahant Bank; and that in either view the Suffolk Bank was not chargeable. Wildes *v.* Nahant Bank, 20 Pick. 352.

[2] Morrill *v.* Brown, 15 Pick. 173; Lovejoy *v.* Lee, 35 Vermont, 430.

[3] Andrews *v.* Ludlow, 5 Pick. 28.

[4] Lupton *v.* Cutter, 8 Pick. 298; Gore *v.* Clisby, 8 Ibid. 555; Copeland *v.* Weld, 8 Maine, 411.

[5] Hopkins *v.* Ray, 1 Metcalf, 79.

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and before the loss had been proved according to the provisions of the policy, B. was garnished. Afterwards B. received the amount of the loss, retained what was due him, and paid the balance on A.'s order to a third person. It was decided that the right to collect the money accruing under the policy was a mere *chose in action*, and that B. was not liable.[1] So, an attorney who has in his care a debt in the course of collection, belonging to a defendant in attachment, cannot be holden as garnishee on that account.[2] So, a note deposited in one's hands, and not collected, will not subject him as garnishee, even though a judgment has been recovered on it in his name.[3] So, where a person holds real estate upon a promise to sell it and pay over the proceeds, and he sells it, and takes notes for the purchase-money, he cannot be held as garnishee, in respect of the notes.[4] So, where one had contracted to deliver to another, at a certain time, a note of a third person for a given amount, and before the time of delivery he was garnished, it was held, that he could not be charged.[5] So, where one had received a check, with authority to draw the amount, and pay it to the defendant on certain conditions, which had been complied with; but it did not appear that he had received the money; it was decided that he could not be charged on account of the check.[6]

[1] Meacham *v.* McCorbitt, 2 Metcalf, 352.
[2] Hitchcock *v.* Egerton, 8 Vermont, 202; Fitch *v.* Waite, 5 Conn. 117.
[3] Rundlet *v.* Jordan, 3 Maine, 47.
[4] Guild *v.* Holbrook, 11 Pick. 101.
[5] New Hamp. I. F. Co. *v.* Platt, 5 New Hamp. 193.
[6] Lane *v.* Felt, 7 Gray, 491.

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CHAPTER XXI.

WHAT POSSESSION OF PERSONAL PROPERTY BY A GARNISHEE WILL MAKE HIM LIABLE.

§ 482. I. *Actual and constructive possession.* When a garnishee is summoned, the effect of the proceeding is to attach any personal property of the defendant in his possession, capable of being seized and sold under execution. And it is a general rule that the property must be in the actual possession of the garnishee, or within his control, so that he may be able to turn it out on execution.[1] But though not in his actual possession, if he have the right to, and the power to take, immediate possession, he must be regarded as being in possession.[2]

The proposition, however, that a garnishee is liable for personal property of the defendant in his possession, applies only to cases

[1] Andrews *v.* Ludlow, 5 Pick. 28; Burrell *v.* Letson, 1 Strobhart, 239. The peculiar language of the Trustee Act of Massachusetts — by the terms of which the liability of the garnishee is based on his having "goods, effects, or credits of the principal defendant *intrusted or deposited* in his hands or possession" — received a construction by the Supreme Court of that State, in Staniels *v.* Raymond, 4 Cushing, 314. The garnishee had in his possession, when summoned, a cow of the defendant's, for the purchase of which he had been in treaty with the defendant. No bargain had been completed, and before the time of trying the cow had expired, and before the garnishment, the garnishee had notified the defendant that he should not purchase the cow, and had delivered her to him, but the defendant left her in his possession, where she was at the time the garnishee was summoned. The court held, that this was not such a possession of the cow as would render the garnishee liable, and said: "The cow had not been taken away, and the question is, whether the mere possession of the cow, without any claim of right, by the supposed trustee, renders him chargeable; and in the opinion of the court it does not. It may well be doubted, whether the trustee is chargeable according to the literal construction of the statute. The words 'intrusted or deposited' imply, in their ordinary signification, something more than mere possession; but if it were otherwise, such a construction would be unreasonable and inadmissible; for thereby an innkeeper would be chargeable for the property of a traveller, which he might have in his possession for the shortest time; and the hirer of a horse for a ride, might be charged as trustee. . . . . We think it never could have been the intention of the legislature, that the mere possession of property, by a party having no claim to hold it against the owner, should render him liable therefor as trustee, and thereby to be subjected to trouble and expense in answering to a claim in which he has no interest. Such a construction of the statute would be prejudicial in very may cases, and cannot be admitted; nor do we think that a literal construction of the statute would render the supposed trustee chargeable."

[2] Lane *v.* Nowell, 15 Maine, 86; Morse *v.* Holt, 22 Ibid. 180.

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where he knows that, when garnished, he had such property in his hands. If he then had property in his possession, received from a third person, which was in fact the defendant's, but not known to him to be so, and he parted with it before he became aware of that fact, he cannot be charged in respect thereof.[1]

§ 483. Constructive possession of the defendant's property will not suffice to make the garnishee liable. Thus, where the garnishee had left in the hands of merchants in a foreign port, goods of the defendant, which had been under his charge as master of a schooner, it was held, that he was not liable on account of the goods, the same not being in his possession when he was garnished, though he held the receipt of the foreign merchants therefor.[2] So, where goods were consigned by merchants in Philadelphia to merchants in Boston, and after the latter received the bill of lading, but before the goods arrived, they were garnished, it was decided that they were not liable, not having the goods in possession when summoned.[3] So, where the garnishees stated that a part of the property transferred by the defendant to them consisted of parts of certain ships, with their cargoes, then at sea, they were held not chargeable, because they had not actual, but only constructive, possession of the property.[4]

§ 484. But, where the agent of a garnishee had collected money for the garnishee, in respect of which the latter would have been liable, had he himself received it, he was charged, though at the time of the garnishment the money had not been paid over to him by the agent.[5] So where one in Pennsylvania was, by his agent in Ohio, in possession of goods of the defendant, he was charged as garnishee of the defendant under an attachment taken out in Pennsylvania.[6]

[1] Bingham v. Lamping, 26 Penn. State, 340.

[2] Willard v. Sheafe, 4 Mass. 235. This case does not, in itself, appear to have been decided on this ground, but in Andrews v. Ludlow, 5 Pick. 28, it is so stated by WILDE, J.

[3] Grant v. Shaw, 16 Mass. 341. The report of this case does not indicate clearly the point stated in the text, but in Andrews v. Ludlow, 5 Pick. 28, it is stated by WILDE, J., to have been decided on that ground.

[4] Andrews v. Ludlow, 5 Pick. 28.

[5] Ward v. Lamson, 6 Pick. 358. The question of actual and constructive possession does not seem to have been before the court in this case.

[6] Childs v. Digby, 24 Penn. State, 23. See Glenn v. Boston & Sandwich Glass Co., 7 Maryland, 287.

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§ 485. II. *Possession considered with reference to privity of contract and of interest between the garnishee and the defendant.* The garnishee must not only have actual possession of the defendant's effects, but there must be, except in cases of fraudulent dispositions of property, privity between him and the defendant, both of contract, express or implied, and of interest, by which the defendant would have a right of action, or an equitable claim, against the garnishee, to recover the property for his own use, either at the present or some future time.[1] The want of privity, either of contract or of interest, will generally prevent the garnishee's being charged. Property may be in the garnishee's hands, in which the defendant has an interest, but which the garnishee may be under no legal obligation to deliver to him; and as the plaintiff can exercise no greater control over the property in such case than the defendant could, the garnishee cannot be charged. There may, too, be property in the garnishee's hands, the legal title to which is in the defendant, and for which the defendant might maintain an action against the garnishee, and yet the latter not be liable as garnishee. Such, for instance, as held in New Hampshire, is the case of a party who has taken the goods of another by trespass, and who cannot, in respect thereof, be held as garnishee of the owner, though the legal title is in the latter, and he might maintain an action for the trespass.[2] Such, too, is the case of one in whom the legal title to goods is vested, but who has no interest of his own in them.

§ 486. The doctrine here advanced may be illustrated by several cases which have arisen; and it will be considered, 1. with reference to privity of contract between the garnishee and the defendant, and, 2. with reference to privity of interest between them.

§ 487. 1. *Privity of Contract.* Money was placed in the hands of certain trustees, to be by them appropriated, at their discretion, for the maintenance and support of a son of the donor, during his life, and afterwards to distribute it among the other children of the donor. While yet a portion of the money was in the hands

[1] Cushing's Trustee Process, § 101; Post, § 490; Skowhegan Bank v. Farrar, 46 Maine, 293.

[2] Despatch Line v. Bellamy Man. Co., 12 New Hamp. 205. See Everett v. Herrin, 48 Maine, 537.

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of the trustees, they were summoned as garnishees of the son, and the court held, that they could not be charged, because they were in no view indebted to him, and he could maintain no action for the sum committed in trust to them.[1] Here, the defendant had an interest in the money in the garnishee's hands, but there was no privity of contract. A. made his bond to B., conditioned to pay B. a yearly sum during the life of C., to be applied by B. to the maintenance of C., his wife or family, or any member of it, according to B.'s judgment and discretion. A. was summoned as garnishee of B. and C., at a time when a portion of the annuity was due and unpaid; and the court held, that he could not be charged as garnishee of either, because, *first*, he was under no legal obligation to C., the *cestui que trust*, and C. could maintain no action against him; and, *second*, though B., the trustee, might maintain an action against him for the money, yet B. was to receive the money, not for his own use, but to be applied to the support of C. In other words, between A. and C. there was no privity of contract, and B. had no interest in the money.[2] A sheriff attached goods of the defendant's, and employed an auctioneer to sell them at public auction, and the auctioneer, while the proceeds of the sale were in his hands, was summoned as garnishee of the defendant; and it was held, that he was not liable, as there was no privity between him and the defendant, and that he should account to the officer who employed him.[3] A. received a certain sum of money from B., for the purpose of paying off a mortgage resting upon the land of C. A. was summoned as garnishee of C., and was discharged, because the money was not C.'s, and because there was no privity between A. and C.[4] So, where A. delivers to his agent B. money to be paid over to C. Until C. acquires a knowledge of the delivery to B. for that purpose, and B. has agreed with him to deliver it to him, there is no privity of contract between them, and B. cannot be charged as garnishee of C.[5] So, where a son was permitted to build a house on his father's land, under the expectation that the land

[1] White *v.* Jenkins, 16 Mass. 62.

[2] Brigden *v.* Gill, 16 Mass. 522. See Hinckley *v.* Williams, 1 Cushing, 490,

[3] Penniman *v.* Ruggles, 6 New Hamp. 166.

[4] Wright *v.* Foord, 5 New Hamp. 178.

[5] Neuer *v.* O'Fallon, 18 Missouri, 277; Briggs *v.* Block, Ibid. 281; Barnard *v.* Graves, 16 Pick. 41; Huntley *v.* Stone, 4 Wisconsin, 91; Eichelberger *v.* Murdock, 10 Maryland, 373; Towne *v.* Griffith, 17 New Hamp. 165.

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would, by devise, come to him at the death of his father, and the father was summoned as garnishee of the son, it was held, that he could not be charged, because there was no contract, express or implied, that he should be accountable to the son for the value of the house.[1] So, where certain policies of insurance were assigned by A. to B., and the assignment contained a clause to the effect that any surplus of the proceeds of the policies should be paid to C., who was not a party to the assignment; it was held, that B. could not be charged as garnishee of C., because there was no privity of contract between B. and C.[2]

§ 488. A garnishee answered that he had in his hands a sum of money belonging to A., and that he had received notice of an assignment of the money by A. to the defendant; but it did not appear that the garnishee had ever promised the defendant to pay it to him; and he was held not to be chargeable, because, though an action for the money might be maintained against him in the name of A., for the defendant's use, yet there was no privity of contract between him and the defendant, which would make him liable.[3]

[1] Wells *v.* Banister, 4 Mass. 514; Bean *v.* Bean, 33 New Hamp. 279. But where the property in the garnishee's hands is in the name of one as a trustee, holding it merely for the use of the defendant, this presents no obstacle to holding it by garnishment, because the beneficial interest is in the defendant, accompanied with a present right of possession and enjoyment. Raynes *v.* Lowell I. B. Society, 4 Cushing, 343.

[2] Field *v.* Crawford, 6 Gray, 116.

[3] Folsom *v.* Haskell, 11 Cushing, 470. By SHAW, C. J.: "The question in this case is, whether a party to whom a *chose in action* has been assigned, so that, *primâ facie*, he could maintain an action thereon in the name of the assignor, is put in such a relation to the debtor that the latter can be summoned as his trustee. The tendency of our laws is to exempt the person, but the more effectually to charge the property of the debtor; yet as this is the first attempt to charge a trustee under such circumstances, although our statutes regulating the trustee process have been in force for seventy years, it becomes the court to look carefully at the case.

"It is conceded that an action would lie against the alleged trustee for this money in the name of the assignor. We are of opinion that this is not enough; but that in order to charge the trustee he must be directly liable to the defendant. The assignee of a *chose in action* is made the attorney of the creditor to collect the debt and hold the proceeds to his own use. The debtor has nothing to do with the relation between the assignor and his assignee. How can he know or try, in this form of proceeding, the question whether the assignment was duly executed, or whether if executed it has been discharged or revoked, or whether other persons have obtained rights by other valid assignments? The whole theory of the trustee process is, that the trustee is a stranger to the suit, and his liability is to be decided on his own answers, and on facts within his own knowledge; and the reason is, that he knows the relation between himself and his creditors. But there is no relation, no privity, between him and the assignee of his creditor. If the trustee had promised to pay the debt to the assignee, the case would be different, for the latter would then be the legal creditor."

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§ 489. 2. *Privity of Interest.* The next class of cases, illustrative of the general doctrine advanced, is, where there is a privity of contract between the garnishee and the defendant, but no privity of interest. In such cases, though the garnishee have in his possession property or money which he is bound by contract to deliver or pay to the defendant, and for which, therefore, the defendant might maintain an action against him, yet he cannot be charged as garnishee in respect thereof, because the defendant himself has no interest therein. Such are the cases where the effects in the garnishee's hands belong to the defendant as a mere trustee or agent for others. There, it is not only sound doctrine technically, but in entire accordance with every principle of justice, that though the legal title to the effects in the garnishee's possession be in the defendant, yet as they do not in fact belong to him, but to others, they shall not be taken to discharge his debts.[1]

Therefore, where it appeared from the answer of the garnishee, that he had executed a bond to the defendant, the condition of which was, that he should pay the defendant a certain sum, part of which only was the defendant's property, and the rest for the benefit of other persons; the court held, that the garnishee should not be charged for that part of the bond which was due to the other persons, and, in delivering their opinion, say: "The bond is made to the defendant, and he had a right to demand payment of it, and to sue it; but still, as it appears that in taking the bond he acted as the trustee of others, it being given for the consideration of the purchase of an estate, the life interest in which was in his mother, and the reversionary interest in his brothers and sisters and their children, the money secured by the bond ought in equity to be distributed among the devisees of the estate in the proportions in which they held the estate."[2] So, in the case previously referred to, where A. had given a bond to B., by which he bound himself to pay B. a certain yearly sum, to be appropriated to the support of C., and A. was summoned as garnishee of B.; it was held, that he could not be charged, because the money due on the bond was not his own, but to be appropriated for the use of others.[3] So, where a factor *del credere* sold goods of his principal, without the purchaser knowing at the time that he was a factor, but was after

[1] Simpson *v.* Harry, 1 Devereux & Battle, 202; Miller *v.* Richardson, 1 Missouri, 310; Jones *v.* Ætna Ins. Co., 14 Conn. 501; Pickering *v.* Wendell, 20 New Hamp. 222.

[2] Willard *v.* Sturtevant, 7 Pick. 194.

[3] Brigden *v.* Gill, 16 Mass. 522.

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wards notified by the owner of the goods that they were his; it was decided that the debt due for the goods belonged to, and was claimable by, the principal, and that the purchaser could not be held as garnishee of the factor, for anything beyond the amount of the factor's lien for his commission.[1] So, where goods were shipped on a vessel, and freight earned for the transportation thereof, and the shipper was summoned as garnishee of the master of the vessel, and it appeared that the owners of the vessel were not indebted to the master, it was held, that the garnishee was not chargeable, and the court based its decision on the following grounds: "The agreement of the master operated to make or create a contract between the owners and the freighters, as well as between the master and the freighters. The master is the mere agent of the owners, removable at pleasure. He contracts on the personal responsibility of the owners, and has no remedy for his wages, as mariners have, against the ship. But, inasmuch as he may hypothecate the ship, and the freight, and the cargo, for necessaries in a foreign port, it has been held in Massachusetts and New York, contrary to the English decisions, that he has a lien upon the freight for necessary disbursements and expenses. And the able judge of the United States Court of this district, has extended the claim also to his wages. But with the question, for what matters or claims the master may have a lien on the freight, we have, in the case at bar, no concern; for the master has been fully paid by the owners. They may, therefore, compel the payment of freight to themselves. The master, under these circumstances, has no more right to the freight-money than he has to the ship. Both belong to the owners."[2]

§ 490. *Privity of Contract and of Interest combined.* We see from the foregoing citations the force and scope of the doctrine that privity of contract and of interest must in general combine in order to charge the garnishee in respect of property of the defendant; and, wherever such combination exists, there is a right of action in the defendant against the garnishee, either at the present or a future time. The presentation of a few cases illustrative of this point will close the consideration of this branch of the subject.

Where property is placed in the hands of one, to be sold, and the proceeds applied to a particular purpose, and upon the sale

[1] Titcomb *v.* Seaver, 4 Maine, 542. [2] Richardson *v.* Whiting, 18 Pick. 530.

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there appears a surplus of money over what is necessary for the given purpose, he will be held as garnishee of the person to whom the property belonged, because privity of contract combines with privity of interest to give the defendant a right of action to recover the surplus.[1] So, for the same reason, one holding real estate of the defendant in his own name, but in trust for the defendant, and accountable to the defendant for the rents and profits thereof, or for the proceeds of the same, if sold, will be held as garnishee of the defendant, to the amount of the rents and profits in his hands.[2] So, where the principal in a bond to the United States, having become a defaulter and left the country, his surety paid, without suit, $1,000, and then arrested the principal in Matanzas, in a suit on a bond of indemnity, and upon receiving $2,000 gave this bond up to the principal. The bond to the United States was afterwards put in suit, and the judgment recovered on it was satisfied by a levy upon land supposed to belong to the principal, which the United States afterwards sold, and the sum paid by the surety was restored to him. After this the surety was summoned as garnishee of the principal, and it was held, that the principal was entitled to recover back the money paid in Matanzas, and that the surety was therefore liable as his garnishee.[3] So, where property claimed by A., being libelled in an admiralty court as a prize, was delivered to B., to indemnify him for bonds given by him in that court in behalf of A., and after a decree of restitution by which the bonds so given were discharged, B. was summoned as garnishee of A., he was held as such, because A. had a right of action against him to recover the property so delivered.[4] So, where a garnishee answered that, as guardian of an infant, he had sold land to the defendant, under a license of court, but that he had not given the bond nor taken the oath required by law previous to such sale; that part of the purchase-money had been paid, and a deed had been executed and placed in the hands of a third person, to be delivered when the residue should be paid; and that the defendant, soon after the sale, entered and was still in possession

[1] Pierson v. Weller, 3 Mass. 564; New England Mar. Ins. Co. v. Chandler, 16 Ibid. 275; Webb v. Peale, 7 Pick. 247; Richards v. Allen, 8 Ibid. 405; Hearn v. Crutcher, 4 Yerger, 461; Cook v. Dillon, 9 Iowa, 407.

[2] Russell v. Lewis, 15 Mass. 127; Park v. Matthews, 36 Penn. State, 28; s. c. 2 Grant, 136.

[3] Watkins v. Otis, 2 Pick. 88.

[4] Thompson v. Stewart, 3 Conn. 171.

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of the land; it was held, that, because there was neither oath nor bond of the guardian, the sale was invalid, and the purchaser, who was the defendant in the attachment, had a right of action against the guardian to recover back what he had paid of the purchase-money, and, therefore, the guardian was liable as garnishee.[1] So, A. was building a vessel, and agreed with B., C., and D., that they should own three sixteenths of the vessel, and should be allowed the amount of all reasonable bills, which they might produce against the vessel, for all such materials as they should supply, until she was fit for sea; and then that he would convey to them three sixteenths of the vessel. B. supplied materials to such an amount as might entitle him to be an owner of one sixteenth part of the vessel, but C. and D. did not furnish their proportions. The vessel was finished, and was chartered by A., on his own account, to another party. A. was summoned as garnishee of B.; and it was decided, that, as B. was not entitled to any part of the vessel, and A. was accountable to him for the amount of supplies he furnished, he was chargeable as garnishee to that amount.[2] So, where one contracts to purchase goods, on certain conditions, to be by him performed, and receives the goods into his possession, but fails to perform the conditions, the vendor of the goods has a right of action to recover the goods, and the vendee will therefore be charged as his garnishee in respect thereof.[3] So, one who contracts to sell personal property, in his possession, but of which he is not the owner, to be delivered at a future day, and receives the purchase-money, but does not deliver the property, by reason of its having been reclaimed by the real owner, may be held as garnishee of the vendee for the amount of the purchase-money.[4]

§ 491. But it is not always necessary that privity of contract and of interest should combine to render the garnishee liable. Where there is privity of contract, but not of interest, but the position of affairs between the garnishee and the defendant is such that, to exempt the garnishee from liability, would tend to an evasion of the force and effect of the law, and to open the door for fraud, the garnishee will be charged, though the privity of interest do not exist. This was held in a case in Pennsylvania, where in an attachment against A., the Bank of the United States was sum-

[1] Williams v. Reed, 5 Pick. 480.
[2] Davis v. Marston, 5 Mass. 199.
[3] Emery v. Davis, 17 Maine, 252.
[4] Edson v. Trask, 22 Vermont, 18.

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moned as garnishee; and it appeared that after the garnishment (an attachment in Pennsylvania having the effect of holding effects coming into the garnishee's hands *after* he is garnished), the defendant deposited in the bank sundry sums of money, and also procured the bank to purchase or discount drafts drawn by him in his own name, the proceeds of which were passed to his credit. The moneys thus passed to the defendant's credit were drawn out on his checks. It appeared that, though the accounts were kept with the defendant in his own name, he was in fact the agent of others in all the transactions, and the jury found that all the funds were deposited and drawn out by him as agent for others. Notwithstanding the jury thus found, the court, on grounds of public policy, and for the prevention of fraud, held the bank liable as garnishee of A.[1]

[1] Jackson *v.* Bank U. S., 10 Penn. State, 61. The views of the court were thus expressed: "The attachment is *in rem*, for the purpose of compelling the appearance of the defendant; and if he, instead of drawing this money out of the bank, had appeared and entered bail to the action, the money would have been free, and the bank might then have paid it to him. But the garnishee chose to be the sole judge and umpire, and to pay out the money to him on his checks, thus in fact recognizing his right to the possession and control of the money, and yet taking the hazard of defeating the object of the attachment. The first question that occurs is this: could the bank, if the attachment had not been served, have resisted the claim of the defendant to the money he had deposited with them? They received it and the bills as his, entered them on their books as his, and were bound, in the absence of any attachment, to have paid the funds to him. How, then, were they placed in any better situation by the service of the attachment? The attaching creditor stands in the place of the defendant. If the bank could not allege as against the defendant, that the funds were not his, neither can they allege against the attaching creditor that they are not the defendant's, and yet turn round and pay the money to the defendant, to enable him to defeat his creditor. In Sergeant on Attachment, p. 94, it is said that the garnishee may plead everything to the *scire facias* which he could plead against the defendant; and if the bank could have pleaded against the defendant that the money and the products of the bills were not his, why did they pay them to him after being warned by attachment? The law countenances not those operations by which its legitimate force and effect may be evaded. Thus, in the case of Silverwood *v.* Bellas, 8 Watts, 420, it was resolved that Silverwood, the garnishee, who had received money in *trust* to deliver it over to the defendant, was liable because he did deliver it over. Here it cannot be gainsaid that the bank was bound to deliver over the money to the defendant in the absence of the attachment.

"The ownership of the defendant is evidenced and maintained by the customary evidence of right, that is, the deposit in the bank in his own name, the books of the bank, the drawing of bills and checks in his own name. Under these circumstances it is against public policy that the bank should be permitted to allege that the books were false for the purpose of defeating the creditor, and yet true for the purpose of paying over the funds to the defendant. . . . . We fear it would open too wide a door for the infliction of fraud, if such practices were tolerated. An individual, made out to be insolvent, may have $100,000, nay, twice that amount, in a bank, entered on its books in his own name, his checks accepted and paid. What amount of credit may he not obtain upon this lure held out to the community? If the cashier, and the party claiming the money, or any other persons, are permitted to prove that the entries are untrue,

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that the depositor has not a cent in the bank, the injury may be deep and grievous to credit, and the source of severe loss to those who have put faith in the integrity and uprightness of banking institutions. . . . . The garnishee after having paid the money to the defendant, and by its own books, papers, and records, given the evidence that it was his, shall not be permitted to allege the contrary for the purpose of protecting itself in a wrongful act. The duty of the garnishee was, having received the money and bills as the money and bills of the defendant himself, to have retained them until liberated by due course of law. . . . . Even suppose that the defendant got this money from many persons, and used it as his own, he became the debtor of those persons, and they lost their grip on the fund. And by mingling this fund with the products of the bills, domestic and foreign, and using the whole as his own, *ab libitum*, and depositing it as such in the bank, this deposit in the bank, so made and evidenced, created a debt or duty from the bank to the defendant, and not any specific or distinct debt or duty to the parties whose money it is alleged it in fact was. The debt or duty was to the defendant in mass; and by paying it to him in the face of an attachment and garnishment, the bank became liable to the plaintiff in attachment."

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CHAPTER XXII.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY THE CAPACITY IN WHICH HE HOLDS THE DEFENDANT'S PROPERTY.

§ 492. THE frequent occasions when money or other property is in the hands of officers of the law, and of persons acting under legal authority, would naturally give rise to efforts to reach it by attachment against the individuals claiming it, or to whom it might be supposed to belong. We consequently find that such efforts have been made, in reference to almost all descriptions of persons holding property or money under official or legal authority. Administrators, executors, and guardians, ministerial, judicial, and disbursing officers, and municipal corporations, have all, at times, been subjected to garnishment, and numerous adjudications as to their liability have been the result. We will review the decisions which have been made.

§ 493. In Massachusetts, at an early day, the principle was established, that a public officer who has money in his hands, to satisfy a demand which one has upon him merely as a public officer, cannot, for this cause, be adjudged a garnishee.[1] The case was that of a county treasurer, who disclosed in his answer that he had a certain sum of money in his possession, officially, which was due to the defendant for services as a juror, and which he was by law bound to pay to the defendant. The court decided against the garnishment on two grounds: one, having relation to the peculiar statute of the State, the other as stated above; but it is evident that, had the former ground not existed, the latter would have been considered sufficient.

The same principle was recognized in Connecticut. There the State's attorney commenced a suit in the name of the county treasurer, on a forfeited bail-bond, taken in a criminal proceeding; and during the pendency of the suit, the general assembly, on the application of the person suffering by the offence complained of, directed the money which should be recovered on such bond to be

[1] Chealy v. Brewer, 7 Mass. 259. See Bulkley v. Eckert, 3 Penn. State, 368.

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paid over to him. The attorney afterwards received the money due on the bond; and while it was in his hands, before any demand upon him, a creditor of the person to whom the general assembly had directed the money to be paid caused the attorney to be garnished. It was held, that the attorney having received and held the money in his official capacity, as agent of the public, the garnishment was not sustainable.[1]

§ 494. The Supreme Court of Massachusetts took a step further, and announced the broader principle, that no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be charged as garnishee in respect of any money or property held by him in virtue of that authority.[2] This decision was elicited by the garnishment of an administrator, and was based upon the principle stated, without reference to the statute under which the process issued. But this immunity extends only to the person himself, thus holding money or property in virtue of such authority. Therefore, one who had collected for A. B., executor of a deceased person, the amount of a promissory note made payable to A. B., *as executor*, was charged as garnishee in a suit against A. B. in his private capacity.[3]

§ 495. Having stated the general rule, we proceed to examine its application to the various descriptions of persons holding money or property in an official or legal capacity.

§ 496. *Administrators.* In the case just cited, the garnishee answered that he had no goods, effects, or credits of the defendant in his possession, except as he was administrator of P. B., deceased; that previous to the death of the said P. B., the defendant had commenced a suit against P. B., to recover the value of certain hides, which suit was pending at the time of the garnishee's answer. The court, without adverting to the facts of the case, or, as before stated, to the terms of the statute, laid down the comprehensive rule above indicated, merely adding, "We have determined this in the case of public officers, and the reason of those decisions applies with equal force to the case of an administrator."

[1] Stillman *v.* Isham, 11 Conn. 124.
[2] Brooks *v.* Cook, 8 Mass. 246; Colby *v.* Coates, 6 Cushing, 558; Thayer *v.* Tyler, 5 Allen, 94. See Mock *v.* King, 15 Alabama, 66.
[3] Coburn *v.* Ansart, 3 Mass. 319

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The Supreme Court of Maine recognized and enforced the same principle, in a case where the intestate was clearly indebted to the defendant, and the administrator had money in his hands ready to pay the debt.[1]

In Delaware, neither an administrator, nor a debtor of an estate, can be summoned as garnishee.[2]

In Arkansas, administrators are considered exempt from garnishment, even after a demand has been allowed against the estate, in favor of the defendant, and an order made by the probate court upon the administrator to pay it.[3] And in North Carolina, it was decided that an administrator cannot be required to answer, as garnishee, whether his intestate was indebted to the defendant.[4]

In Alabama, however, it seems to be conceded that an administrator may be charged as garnishee in respect of a debt due from his intestate to the defendant,[5] but not unless he is summoned in his representative capacity.[6]

§ 497. In New Hampshire, in Delaware, and in Missouri, however, while the principle announced in Massachusetts was recognized as sound, it was considered to be inapplicable, where the administrator had been, by the proper tribunal, adjudged and ordered to pay a certain sum to a creditor of the estate; and in such case the administrator was charged as garnishee of the party to whom the money was ordered to be paid.[7] The reason of this exception was given by the Superior Court of New Hampshire, and adopted by the Supreme Court of Missouri. In the language of the former, "an administrator, till he is personally liable to an action in consequence of his private promise, the settlement of the estate, some decree against him, or other cause, cannot be liable to a trustee process. Because, till some such event, the principal has no ground of action against him in his private capacity; and he is bound to account otherwise for the funds in his hands. The suit against him, till such an event, is against him in his representative capacity, and the execution must issue to be levied

[1] Waite v. Osborne, 11 Maine, 185.
[2] Marvel v. Houston, 2 Harrington, 349.
[3] Thorn v. Woodruff, 5 Arkansas, 55; Fowler v. McClelland, Ibid. 188.
[4] Welch v. Gurley, 2 Haywood (N. C.), 334; Gee v. Warwick, Ibid. 354.
[5] Terry v. Lindsay, 3 Stewart & Porter, 317; Tillinghast v. Johnson, 5 Alabama, 514.
[6] Tillinghast v. Johnson, 5 Alabama, 514.
[7] Adams v. Barrett, 2 New Hamp. 374; Fitchett v. Dolbee, 3 Harrington, 267; Curling v. Hyde, 10 Missouri, 374; Richards v. Griggs, 16 Ibid. 416.

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de bonis testatoris and not *de bonis propriis*. But in the present case, the trustee was liable in his private capacity to the defendant for the dividend. The debt had been liquidated, and a decree of payment passed. The debt was also due immediately. Execution for it would run against his own goods; and the trustee process would introduce neither delay nor embarrassment in the final settlement of the estate." [1]

In Vermont, where an administrator had been decreed by the probate court to deliver property to a female distributee of the estate, and was afterwards summoned as garnishee of the husband of the distributee, the court admitted the general principle of the exemption of an administrator from garnishment; but in view of the peculiar statute of that State, and of the fact that a decree of distribution had passed, charged the administrator as garnishee.[2]

§ 498. In Pennsylvania, under a statute which in terms authorized the garnishment of administrators, it was held, that a distributive share of personal estate could not be attached, before the administrator had settled his account, so as to show what is due from him to the distributee.[3] And in Massachusetts, where a similar statute now exists, it was decided that an administrator cannot be charged under a writ served on him between the time when administration is decreed to him, and that of the filing and approval of his bond and the delivery of letters to him.[4] And in Maine, under a statute authorizing "any debt or legacy, due from an executor or administrator, and any goods, effects, and credits in his hands, as such," to be attached by garnishment, it was decided that an administrator could not be charged as garnishee, in respect of a negotiable promissory note of his intestate, held by the defendant, where the same statute forbids

[1] Adams *v.* Barrett, 2 New Hamp. 374.

[2] Parks *v.* Hadley, 9 Vermont, 320.

[3] Bank of Chester *v.* Ralston, 7 Penn. State, 482; McCreary *v.* Topper, 10 Ibid. 419; Hess *v.* Shorb, 7 Ibid. 231. In Hartle *v.* Long, 5 Penn. State, 491, an administrator was garnished, when there was no law authorizing such a proceeding. Eleven years afterwards such a law was enacted, and the plaintiff then issued a *scire facias* to subject in the hands of the administrator certain moneys which had then, by the death of the widow, become payable to the defendant; but the court held, that the law could have no retrospective operation, and that as the moneys were not, before its passage, liable to the attachment, no proceedings based on the original attachment could reach it.

[4] Davis *v.* Davis, 2 Cushing, 111.

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the garnishment of a person in respect of a negotiable note made by him.[1]

§ 499. *Executors.* It is well settled in England and the United States, as a general proposition, that an executor cannot be held as garnishee, in respect of a pecuniary legacy bequeathed by his testator.[2] To this, however, an exception would be made, as in the case of administrators, where the executor has been ordered by the probate court to pay the amount to the legatee.[3]

The earliest American case on this subject, with which we are acquainted, came up in Massachusetts, where it was held, that a pecuniary legacy in the hands of an executor is not "goods, effects, or credits"; and that the same principles which exempt a public officer from garnishment, apply with equal force to the case of an executor; and this without reference to whether the garnishment took place before or after the probate of the will.[4]

The same point came up in a similar case in Connecticut, where the garnishment took place after the probate of the will, and the acceptance by the executor of his appointment. The court below instructed the jury that the executor was in contemplation of law the debtor of the defendant, the legatee, and liable to pay the plaintiff's claim out of his own estate. The Supreme Court, in reversing the judgment, use the following language: "An executor cannot be considered as the debtor of a legatee. The claim is against the testator or his estate; and the executor is merely the representative of the deceased. There cannot be a debt due from the executor within the meaning of the statute. Nor can a person, like an executor, deriving his authority from the law, and bound to perform it according to the rules prescribed by law, be considered as a trustee, agent, attorney, or factor within

[1] Commercial Bank *v.* Neally, 39 Maine, 402.

[2] Priv. Lond. 267; Toller on Executors, 4th Am. Ed. 478; Barnes *v.* Treat, 7 Mass. 271; Winchell *v.* Allen, 1 Conn. 385; Beckwith *v.* Baxter, 3 New Hamp. 67; Shewell *v.* Keen, 2 Wharton, 332; Barnett *v.* Weaver, Ibid. 418; Picquet *v.* Swan, 4 Mason, 443. In opposition to the doctrine stated in the text, the Supreme Court of Indiana stands alone, in holding an executor chargeable as garnishee, in respect of an unascertained distributive share of an heir of a decedent. The statute under which this decision was given provided that "the lands, tenements, hereditaments, goods, chattels, rights, credits, moneys, and effects, of any and all persons not residents of this State, are and shall be liable for the payment of debts and other demands, by suit to be instituted by the process of foreign attachment." Stratton *v.* Ham, 8 Indiana, 84.

[3] Fitchett *v.* Dolbee, 3 Harrington, 267.

[4] Barnes *v.* Treat, 7 Mass. 271.

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the statute; and this for the best of reasons. In the common case of agents, trustees, and factors, the creditor can easily place himself in the shoes of the absconding debtor, and prosecute his claim without inconvenience to the garnishee. But such would not be the case with an executor. It would not only embarrass and delay the settlement of estates, but would often draw them from courts of probate, where they ought to be settled, before the courts of common law, who would have no power to adjust and settle his accounts. Such an interference might produce much inconvenience, and prevent the executor from executing his office as the law directs."[1]

This subject received an elaborate and able treatment by the Supreme Court of Pennsylvania, in a case where the amount involved was large, and the whole subject was fully investigated by eminent counsel. The question presented was, in effect, the same as in the cases which arose in Massachusetts and Connecticut, and the court, in an elaborate opinion, decided that an executor could not be charged in respect of a legacy due to the defendant.[2]

[1] Winchell *v.* Allen, 1 Conn. 385.

[2] Shewell *v.* Keen, 2 Wharton, 332. The opinion of the court was in the following terms: "In every case in which a determination has taken place on the question whether a foreign attachment would lie for a legacy, it has been held that it would not; and some of these cases have occurred under statutory regulations on the subject, very similar to our own. Various reasons have been given for coming to this result; and a little reflection convinces us that the proceedings by foreign attachment cannot be applied to the case of a legacy, withoul great inconvenience and manifest incongruity.

"A pecuniary legacy is not a debt. It is a sum of money, payable by the executor or administrator out of the estate of the decedent, if sufficient assets remain in his hands, after discharging the debts of the deceased, and other responsibilities, and provided the legatee previously complies with certain requisites prescribed by the acts of assembly. Generally it is not recoverable at law, but is subjected to chancery jurisdiction, which treats the executor as trustee of the estate for the benefit of those interested in it. In Pennsylvania, a legacy is recoverable in a common law court, by the act of 1772, there being no court of chancery; but that act gives peculiar powers to the court; and the executor's duty is still in nature of a trust, in relation to legacies; and they are payable only on the performance of certain conditions by the legatee. He must make a previous demand, and must tender or file a refunding bond, not so much for the protection of the executor, as for the benefit of creditors who may subsequently establish claims against the estate. If a foreign attachment be permitted, by which the assets in the hands of the executor are to be eventually appropriated to the attaching creditor, the legacy may be recoverable without demand, and without filing a refunding bond. For the legatee would not be expected to give such bond, and there exists no power in the court to compel the attaching creditor to do it, or to authorize the executor to receive it from him. If the refunding bond could be given, an extraordinary result might follow. The plaintiff, before the payment of the money by the garnishee, always gives security to restore the amount received, if within a year and a day the defendant should appear to disprove the debt. If, within the year

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§ 500. While, however, an executor cannot be charged as garnishee in respect of a legacy bequeathed by his testator, it does not follow that in no case can a legacy be subjected to attachment against the legatee; for, if land be devised with a legacy charged upon it, the devisee will be held as garnishee of the legatee, in respect of the legacy.[1]

§ 501. In Massachusetts, a statute was enacted, providing that "any debt or legacy due from an executor or administrator, and any other goods, effects, and credits, in the hands of an executor or administrator, as such, may be attached in his hands by the process of foreign attachment."[2] Under this statute it has been

and a day, the defendant issue his *scire facias ad disprobandum debitum*, and succeeds, and recovers back his legacy, he then gets it without giving any refunding bond; and the plaintiff may be compelled, in the event of new debts against the estate being afterwards established, to pay the amount a second time on his refunding bond. Such consequences evince that the process by foreign attachment cannot be harmonized with the acts of assembly concerning the recovery of legacies.

"Another circumstance of weight is, that an executor or administrator is, to a certain extent, an officer of the law, clothed with a trust to be performed under prescribed regulations. It would tend to distract and embarrass those officers, if, in addition to the ordinary duties which the law imposes, of themselves often multiplied, arduous, and responsible, they were drawn into conflicts created by the interposition of creditors of legatees, and compelled to withhold payment of legacies without suit; to suspend indefinitely the settlement of estates; to attend, perhaps, to numerous rival attachments; to answer interrogatories on oath, and to be put to trouble and expense for the benefit of third persons, no way connected with the estate, nor within the duties of their trust. It has been decided that money in the hands of a prothonotary or sheriff cannot be intercepted by a creditor of the party entitled to it; but it must be paid over to himself only. The case of an executor or administrator is analogous to that of a sheriff or prothonotary. He has the funds in his hands as an officer or trustee authorized by law; and if a new party were allowed to levy on it by attachment, there would be no end of disputes and lawsuits; and no business could be certain of ever being brought to a close within a reasonable time. It is of great importance to the interests of heirs, creditors, and legatees, that the affairs of a decedent's estate be kept as simple and distinct as possible, that its concerns be speedily closed and the estate adjusted. It is moreover settled that an executor cannot be sued as defendant, in an attachment by a creditor of the testator, and the goods of the testator attached to recover the debt. The reason is, that the estate of the testator ought to come into the hands of the executor, that he may administer it according to law; and pay the debts if the assets suffice; and they ought not to be stopped, and the executor subjected to new responsibilities by proceedings in attachment. These reasons apply with equal force to the attempt to make an executor garnishee, for the purpose of paying out of the assets in his hands the debt due to a creditor of a legatee. These funds must travel only in the path pointed out by the laws relating to decedents' estates, in their various branches, and cannot be diverted out of that path without interfering with salutary regulations, and violating some of the most important provisions of the acts of assembly." See Barnett *v.* Weaver, 2 Wharton, 418; Young *v.* Young, 2 Hill (S. C.), 425.

[1] Piper *v.* Piper, 2 New Hamp. 439; Woodward *v.* Woodward, 4 Halsted, 115.

[2] Revised Statutes of Massachusetts, c. 109, § 62.

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held, that a legacy in the hands of an executor is not such a contingent liability as will prevent its being attached, because it can be ascertained by the settlement of the estate whether there are assets sufficient for the payment; and when necessary, the court will continue the case until it can be seen whether the assets are sufficient for that purpose;[1] or, if there be not personalty sufficient for the payment, until license can be obtained to sell real estate for that purpose.[2] And if the executor, after being summoned as garnishee, pay over the legacy to the legatee, such payment will not protect him, and will be regarded as such an acknowledgment that there were assets in his hands, that he will not be entitled to any continuance thereafter, for the purpose of having that fact determined by the settlement of the estate.[3] In all such cases the attaching plaintiff must, if required by the executor, give bond to refund the money, if the same should be needed to satisfy any demands afterwards recovered against the estate, and to indemnify the executor.[4] But there does not seem to be a disposition in the courts of that State to extend the operation of the statute in question beyond its clear intendment; for they refused to charge an executor as garnishee of one to whose daughter a legacy was left, and which descended to him upon the death of his daughter; because, before any proceeding could be instituted against the executor for the legacy, administration on her estate was necessary, and the legacy would be assets in the hands of her administrator.[5]

§ 502. *Guardians.* Persons acting as guardians of infants are considered to stand in the same position as administrators and executors, and to come within the general principle before stated, and, therefore, not liable as garnishees in respect of property of their wards in their possession, as guardians.[6] So, in New Hampshire, with regard to a guardian of an insane person, at least until his accounts have been adjusted by the probate court, and a balance found in his hands.[7]

[1] Holbrook *v.* Waters, 19 Pick. 354; Wheeler *v.* Bowen, 20 Ibid. 563.
[2] Cady *v.* Comey, 10 Metcalf, 459.
[3] Hoar *v.* Marshall, 2 Gray, 251.
[4] Cady *v.* Comey, 10 Metcalf, 459.
[5] Stills *v.* Harmon, 7 Cushing, 406.
[6] Gassett *v.* Grout, 4 Metcalf, 486; Hansen *v.* Butler, 48 Maine, 81; Perry *v.* Thornton, 7 Rhode Island, 15; Godbold *v.* Bass, 12 Richardson, 202.
[7] Davis *v.* Drew, 6 New Hamp. 399.

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§ 503. *Sheriffs.* The same considerations which forbid the garnishment of executors, administrators, and guardians, require that all ministerial officers, having official possession of property or money, should be exempt from that proceeding. We accordingly find that, almost without exception, the courts in England[1] and this country have taken decided ground against all attempts to reach, by garnishment, money in the hands of sheriffs, received and held by them in their official capacity.

§ 504. This subject has been presented in three aspects: 1. By the levy of an execution by an officer on money in his hands collected on execution; 2. By the levy of an attachment on such money; and 3. By the garnishment of the sheriff in respect thereof. The object aimed at in each of these cases being the same, the general principles governing each are equally applicable to all, and cannot be affected by the difference in the modes of attaining the same result. Whether the proceeding be by actual levy or by garnishment, cannot change the aspect of the question, since the latter is in effect as much an attachment as the former. Hence, there is no just ground for the distinction which has been made in favor of allowing the money to be reached by garnishment as a *right* or *credit* in the sheriff's hands, though held not to be attachable by levy. Obviously, if its abstraction from his custody by levy be inadmissible, the law will not tolerate its abstraction by a circuitous and less direct method. We shall, therefore, in the consideration of the subject, use indiscriminately the decisions relating to the three modes of proceeding above referred to.

§ 505. The first and leading case in this country, bearing on this subject, was decided by the Supreme Court of the United States. A sheriff having collected money on execution, levied thereon an execution which he held against the person for whom the money was collected. Two questions were made: 1. Can an execution be levied on money? and 2. Can it be levied on money in the hands of the officer? The court decided the former affirmatively, and held the following language in reference to the latter: "The general rule of law is, that all chattels, the property of the debtor, may be taken in execution, and whenever an officer has it

[1] 1 Leonard, 30, 264; Priv. Londini, 265; Comyns's Digest, Attachment, D; Bac. Ab., Customs of London, H.

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in his power to satisfy an execution in his hands, it is his duty to do so, and if he omits to perform his duty, he must be accountable to those who may be injured by his omission. But has money, not yet paid to the creditor, become his property? That is, although his title to the sum levied may be complete, has he the actual legal ownership of the specific pieces of coin which the officer may have received? On principle the court conceives that he has not this ownership. The judgment to be satisfied is for a certain sum, not for the specific pieces which constitute that sum, and the claim of the creditor on the sheriff seems to be of the same nature with his claim under the judgment, and one which may be satisfied in the same manner. No right would exist to pursue the specific pieces received by the officer, although they should even have an ear-mark; and an action of debt, not of detinue, may be brought against him, if he fails to pay over the sum received, or converts it to his own use. It seems to the court, that a right to specific pieces of money can only be acquired by obtaining the legal or actual possession of them, and until this is done, there can be no such absolute ownership as that execution may be levied on them. A right to a sum of money in the hands of a sheriff can no more be seized than a right to a sum of money in the hands of any other person, and however wise or just it may be to give such a remedy, the law does not appear yet to have given it." The court then comment upon some English cases which had been cited, and thus conclude the consideration of this branch of the case: "Considering the case then either on principle or authority, it appears to the court that the creditor has not such a legal property in the specific pieces of money levied for him and in the hands of the sheriff, as to authorize that officer to take those pieces in execution as the goods and chattels of such creditor." [1]

The same conclusion was arrived at in Kentucky, in a case where the facts were almost identical.[2]

In Ohio, the same question arose, in consequence of a sheriff levying an attachment on money in his hands collected under execution. There the court said: "While the money remains in the hands of the officer, it is in the custody of the law. It does not become the property of the judgment creditor till it is paid over, and consequently it is not liable to be attached as his. The writ of attachment could not supersede the execution, or release the

[1] Turner v. Fendall, 1 Cranch, 117. [2] First v. Miller, 4 Bibb, 311.

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sheriff from a literal compliance with its command, which required him to bring the money into court, so that it might be subject to their order. . . . . A strong argument might also be drawn from the mischievous consequences that would follow such a course of practice. It would lead to endless delay and vexation. One attachment might follow another, till the whole demand was absorbed in costs."[1]

§ 506. If, then, money in the hands of a sheriff in his official capacity cannot be levied on by execution or attachment, can it be reached by garnishment? In Vermont and New Jersey, the courts have held, that though the levy is impracticable, yet the garnishment may be maintained, on the ground that the money is a right or credit of the defendant's in the sheriff's possession.[2] In New Hampshire, the doctrine was at one time incidentally asserted, that the sheriff could not be garnished *before* the return day of the execution;[3] but afterwards the same court receded from this view, and sustained such a garnishment.[4] These decisions are, however, overborne by the weight of authority.

This question received an early consideration and decision in Massachusetts.[5] A sheriff had collected money on execution, and before the writ was returnable the money was attached in his hands, by garnishment, under an attachment against the execution creditor. The court were unanimous in discharging the garnishee. PARKER, J., said: "When an officer receives money upon an execution, the law prescribes his duty in relation to it. He is not bound to pay it over to the creditor until the return day of the execution. From his receipt of it until that day, it is not the creditor's money, but is in the custody of the law." SEWALL, J.: "I consider the statute giving this process of foreign attachment as a very beneficial one, and am therefore for applying a liberal construction to it. But there must be bounds to this liberality. In the case before us, an officer, in the execution of a precept of the law, has received money, for which he is accountable to

[1] Dawson *v.* Holcombe, 1 Ohio, 134. See Prentiss *v.* Bliss, 4 Vermont, 513; Dubois *v.* Dubois, 6 Cowen, 494; Crane *v.* Freese, 1 Harrison, 305; Reddick *v.* Smith, 4 Illinois (3 Scammon), 451.

[2] Conant *v.* Bicknell, 1 D. Chipman, 50; Hurlburt *v.* Hicks, 17 Vermont, 193; Lovejoy *v.* Lee, 35 Ibid. 430; Crane *v.* Freese, 1 Harrison, 305.

[3] Adams *v.* Barrett, 2 New Hamp. 374.

[4] Woodbridge *v.* Morse, 5 New Hamp. 519.

[5] Wilder *v.* Bailey, 3 Mass. 289.

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a third person. An attempt is made to interrupt the execution of the precept, and to divert the money from the course which the law prescribed. If such practice should be permitted, great inconvenience and mischief would be the consequence." SEDGWICK, J., after arriving at the conclusion that the money was neither goods nor effects of the execution plaintiff, thus proceeds: "Neither can this money, in my opinion, be considered as a *credit* in the hands of the officer. There cannot be a credit without a creditor and debtor. There is nothing in the reason of the thing, resulting from the relation of a judgment creditor and an officer who has collected money for him, which renders the one a creditor, and the other a debtor. There is nothing said in any of the books, which implies that that relation exists between them. On the contrary, money so collected is in the custody of the law, and the sheriff is the trustee for its safe keeping. I confess that I should have been extremely sorry to have found that the attempt to charge the officer as the trustee of the judgment creditor could have been supported. If it could, a principle would have been established, that an execution, which has been justly called *finis et fructus* of legal pursuits, might be eternally defeated. A judgment debtor would have had nothing more to do, when he had paid the money, than to engage a friend, who had, or who would pretend that he had, a demand against the creditor, and fix the money in the hands of the officer, as long as there could be any pretence of keeping alive the suit; and when that could no longer be done, a new action might be instituted, and the same consequences ensue, and so on, *ad infinitum*. This might be done independently by the debtor, merely to gratify revenge; it might be done by collusion between the officer and the debtor; or it might be done even by the officer alone, to secure to himself the use of the money, which, from its amount, might vastly overbalance the trifling expenses which he would incur." PARSONS, C. J., concurred with his associates upon substantially the same grounds taken by them.

This case, it will be remarked, presented the question of garnishment of a sheriff *before* the return day of the execution. In a subsequent case, where the garnishment took place *after* the return of the execution, the same court affirmed and applied its previous decision.[1]

[1] Pollard *v.* Ross, 5 Mass. 319.

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A late expression of the views of that court on this subject, was in a case where an officer, charged with the service of criminal process against a person, arrested him, and, as incidental to the service of the process, took from him money and property found in his possession. The next day, being satisfied that the prisoner had committed no crime, he went to the jail to return the money and property to him, and when about entering the jail, was summoned as garnishee of the prisoner. The question was, whether the officer was exempt from garnishment, under that clause of the statute which declared that no person should be adjudged a trustee "by reason of any money in his hands as a public officer, and for which he is accountable, merely as such officer, to the principal defendant." The court held, that the money was taken by the officer in the performance of his official duty, and that, therefore, he could not be charged in respect thereof.[1]

The doctrine settled in Massachusetts, has been also established in Maryland, North Carolina, South Carolina, Alabama, Tennessee, Illinois, Missouri, and California, and incidentally recognized in Maine.[2] Viewed either as sustained by authority, or as resting on sound principles, it may properly be considered as settled.

§ 507. If money collected cannot be so reached, it follows, *a fortiori*, that a sheriff cannot be charged as garnishee in respect of an execution in his hands upon which the money has not been collected.[3]

§ 508. But though a sheriff holding money received in payment of an execution, and which ought to be paid to the execution creditor, cannot, in respect thereof, be garnished, yet there are other circumstances in which his official character affords him no protection from garnishment. In all the cases considered, it was held that the money was in the sheriff's hands *virtute officii*, and therefore in the custody of the law. But where money in his hands has ceased to be in such a position as to claim the protec-

[1] Robinson *v.* Howard, 7 Cushing, 257; Morris *v.* Penniman, 14 Gray, 220.

[2] Farmers' Bank *v.* Beaston, 7 Gill & Johnson, 421; Jones *v.* Jones, 1 Bland, 443; Overton *v.* Hill, 1 Murphey, 47; Blair *v.* Cantey, 2 Speers, 34; Burrell *v.* Letson, Ibid. 378; s. c. 1 Strobhart, 239; Zurcher *v.* Magee, 2 Alabama, 253; Pawley *v.* Gains, 1 Tennessee, 208; Drane *v.* McGavock, 7 Humphreys, 132; Lightner *v.* Steinagel, 33 Illinois, 510; Marvin *v.* Hawley, 9 Missouri, 382; Clymer *v.* Willis, 3 California, 363; Staples *v.* Staples, 4 Maine, 532; Hill *v.* La Crosse & M. R. R. Co., 14 Wisconsin, 291.

[3] Sharp *v.* Clark, 2 Mass. 91.

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tion of the law, he will be subject to garnishment, as any other person would be. Therefore, where a sheriff, holding an execution, sells property, and, after satisfying the execution, there is a surplus in his hands, it is considered to belong to the defendant, and to be held by the sheriff in a private, and not in his official, capacity, and may, therefore, be reached by the defendant's creditors, either by direct attachment or by garnishment.[1] The same rule extends to a receipter, in whose hands the officer has placed attached property. If there is more than sufficient to satisfy the attachment, the receipter may be charged as garnishee of the defendant in respect of the surplus.[2] And where one who had been sheriff, received, while in office, a list of fees to collect for a register of a county, and made collections thereof, and after both he and the register had gone out of office he was summoned as garnishee of the latter, it was held, that the money collected by him was not *in custodia legis*, and that he was chargeable as garnishee in respect thereof.[3] And in Connecticut, where an execution commands the sheriff "that of the money of the said defendant, or of his goods, chattels, or lands, within your precincts, you cause to be levied, *and paid and satisfied unto the plaintiff*" the judgment debt and costs, it was held, that this language, instead of the ordinary command to the officer to have the money *in court*, made him the agent of the plaintiff in its collection, and that he might be charged as garnishee of one for whom he had collected money on execution.[4]

§ 509. *Clerks of Courts.* The same principles which we have seen applied to administrators, executors, guardians, and sheriffs, are applicable to clerks of courts, who frequently have money of others in their possession officially. It has been decided, that money paid into the hands of a clerk on a judgment,[5] and that money in the possession of a clerk in any manner in virtue of his

[1] Watson *v.* Todd, 5 Mass. 271; Orr *v.* McBryde, 2 Carolina Law Repository, 257; King *v.* Moore, 6 Alabama, 160; Tucker *v.* Atkinson, 1 Humphreys, 300; Davidson *v.* Clayland, 1 Harris & Johnson, 546; Jaquett *v.* Palmer, 2 Harrington, 144; Wheeler *v.* Smith, 11 Barbour, 345; Hearn *v.* Crutcher, 4 Yerger, 461; Pierce *v.* Carleton, 12 Illinois (5 Gilman), 358; Lightner *v.* Steinagel, 33 Ibid. 510; Dickison *v.* Palmer, 2 Richardson, Equity R. 407; Hill *v.* Beach, 1 Beasley, 31; Lovejoy *v.* Lee, 35 Vermont, 430.

[2] Cole *v.* Wooster, 2 Conn. 203.

[3] Robertson *v.* Beall, 10 Maryland, 125.

[4] New Haven Saw-Mill Co. *v.* Fowler, 28 Conn. 103.

[5] Ross *v.* Clarke, 1 Dallas, 354; Alston *v.* Clay, 2 Haywood (N. C.), 171.

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office,[1] and that money paid into court,[2] cannot be attached. But it has been held, that money in the hands of a clerk, arising from a sale of land in partition, which he has been ordered by the court to pay over to the parties concerned, may, after such order, be attached.[3]

If money in the official possession of a clerk cannot be reached by garnishment, much less can the service of an attachment on him have the effect of attaching a judgment in favor of the attachment defendant, remaining of record in his court.[4] And still less is the officer authorized to seize the record of the judgment. The only mode of reaching the judgment in such case is, to summon the judgment debtor as garnishee.[5]

§ 509 *a*. *Receivers, Trustees of Courts, and Trustees accountable to Courts.* Money in the hands of a receiver appointed by a court cannot be attached in his hands.[6] In Georgia, this rule was applied to a case where the suit in which the receiver was appointed was terminated; for he was accountable to the court, and the money was, therefore, *in custodia legis*.[7] And so in Louisiana.[8] But where the register of a court of chancery held a surplus of money belonging to a defendant, after a sale of property to satisfy a mortgage decree, he was, in Alabama, charged as garnishee of the defendant in respect of such surplus, although the sale had not been confirmed, and he was directed by the decree to report his doings at the next term of the court.[9]

The rule applied to receivers is equally applicable to trustees appointed by courts of chancery;[10] and to a trustee holding property which, by the terms of his trust, is to be disposed of by the order of a court.[11]

[1] Hunt *v.* Stevens, 3 Iredell, 365; Drane *v.* McGavock, 7 Humphreys, 132.

[2] Farmers' Bank *v.* Beaston, 7 Gill & Johnson, 421; Murrell *v.* Johnson, 3 Hill (S C.), 12; Bowden *v.* Schatzell, Bailey, Eq. R. 360.

[3] Gaither *v.* Ballew, 4 Jones, 488.

[4] Daley *v.* Cunningham, 3 Louisiana Annual, 55.

[5] Hanna *v.* Bry, 5 Louisiana Annual, 651.

[6] Glenn *v.* Gill, 2 Maryland, 1; Taylor *v.* Gillian, 23 Texas, 508.

[7] Field *v.* Jones, 11 Georgia, 413.

[8] Nelson *v.* Conner, 6 Robinson (La.), 339.

[9] Langdon *v.* Lockett, 6 Alabama, 727.

[10] Bentley *v.* Shrieve, 4 Maryland Ch'y Decisions, 412.

[11] Cockey *v.* Leister, 12 Maryland, 124. In McPherson *v.* Snowden, 19 Maryland, 197, the Court of Appeals of Maryland, referring to the previous cases on this point, said: "We do not, however, understand from these cases that an attachment cannot be issued and laid in the hands of a trustee before a final account, and that it would

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§ 510. *Justices of the Peace.* In some States, it is the practice for money collected by a constable on an execution issued by a justice of the peace, to be paid into the hands of the justice. It would seem to follow, from the numerous decisions previously considered, that such an officer could not be garnished in respect of money so received, and in Pennsylvania it has been so held.[1] But in Alabama, it was decided otherwise, on the ground (peculiar to their system of laws) that the justice is not merely a judicial officer in relation to the collection of small debts, but the agent of the person who intrusts their collection with him; and that as soon as the money is collected, his character as a magistrate ceases, and he holds it as any other agent.[2]

§ 511. *Trustees of Insolvents, and Assignees in Bankruptcy.* In Massachusetts, it has been decided that effects in the hands of an assignee of a bankrupt cannot be reached by garnishment, as they are not the effects of the bankrupt, but are by law vested in the assignee.[3] Upon the same ground, and also because the attachment, under such circumstances, of the effects of a bankrupt or insolvent, would utterly defeat the whole policy of the bankrupt or insolvent laws, the same decision has been made in Maryland, with regard to assignees in bankruptcy and trustees of insolvent debtors.[4]

In the former State, however, this exemption of assignees in bankruptcy was at one time held to extend only to cases where it was sought to reach the bankrupt's effects to subject them to the payment of his debts. Therefore, where an assignee was garnished, in an action against a creditor of the bankrupt, to whom a dividend of the bankrupt's estate was due, he was charged as garnishee.[5] It does not, however, appear that the question was raised whether an officer of this kind was exempted by his official character from the operation of this process. But recently the Supreme Court of that State overruled the cases just cited, and

not be effective upon a sum ascertained by such an account to be the distributive share of the debtor in the attachment; but that the process, before the account is stated, cannot affect the fund or the trustee, or compel any modification of the final account, for the benefit of the attaching creditor."

[1] Corbyn *v.* Bollman, 4 Watts & Sergeant, 342.

[2] Clark *v.* Boggs, 6 Alabama, 809.

[3] Oliver *v.* Smith, 5 Mass. 183.

[4] Farmers' Bank *v.* Beaston, 7 Gill & Johnson, 421.

[5] Jones *v.* Gorham, 2 Mass. 375; Decoster *v.* Livermore, 4 Ibid. 101.

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held that an assignee under the insolvent law, having money in his hands, payable to the defendant as a creditor of the insolvent, could not be charged as garnishee in respect thereof.[1]

§ 512. *Disbursing Officers.* We have already seen that a county treasurer could not be charged as garnishee, in respect of a sum of money due to the defendant from the county, and which it was the treasurer's duty to pay.[2] A similar case arose in Kentucky, where an attempt was made to reach a sum of money allowed by the legislature to an individual, by garnishing the auditor and treasurer of the State; but it was held that the proceeding could not be maintained.[3] And so in Tennessee, where, in a proceeding by attachment, in chancery, it was sought to reach the salary of the treasurer of the State, by the operation of the attachment on the State comptroller, whose official duty it was to issue his warrant for the salary.[4]

The Supreme Court of the United States settled the same rule with regard to all governmental disbursing officers. The U. S. Frigate Constitution returned from a cruise, and several writs of attachment were issued by a justice of the peace, against seamen of the frigate, under which the purser of the ship was garnished. The purser admitted before the justice having money in his hands due to the defendants, but contended he was not amenable to the process. Judgment was, however, given against him, and, on appeal to the Superior Court of the county, was affirmed. The case went thence to the Supreme Court of the United States, which tribunal reversed the judgment, and in doing so held the following language: "The important question is, whether the money in the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem, cannot, in this respect, be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle

[1] Colby *v.* Coates, 6 Cushing, 558; Dewing *v.* Wentworth, 11 Ibid. 499.
[2] Chealy *v.* Brewer, 7 Mass. 259; Bulkley *v.* Eckert, 3 Penn. State, 368.
[3] Divine *v.* Harvie, 7 Monroe, 439. See Spalding *v.* Imlay, 1 Root, 551.
[4] Bank of Tennessee *v.* Dibrell, 3 Sneed, 379.

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is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might prove fatal to the public service.

"The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by State process or otherwise, the functions of the government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects. The purser is not the debtor of the seamen." [1]

§ 513. But, where the garnishee, though acting under public authority, is not a public officer, but merely an agent for a particular purpose, a distinction has been made. Thus, where a town in New Hampshire (in pursuance of a law authorizing the several towns to make a disposition of the public money deposited with them, in such manner as each town should by a major vote determine), voted to distribute it "to the inhabitants of the town *per capita*," according to a census to be taken, and appointed an agent to make the distribution; it was held, that the agent could be charged as garnishee of one of the inhabitants in respect of his distributive share.[2]

§ 514. The position taken by the Supreme Court of the United States, that the money, while in the hands of the disbursing officer, though delivered to him for the purpose of being paid to the defendant, is still the money of the government, applies as well to all cases where an agent has, without any privity between him and the defendant, received from his principal money to be paid to the defendant, but which he has not yet paid, or agreed with the defendant to pay, to him. There, any attempt, in a proceeding against the party to whom the money is to be paid, to reach it by garnishment of the agent, will be unavailing; for he is not the debtor of the defendant, nor is the money in his

[1] Buchanan *v.* Alexander, 4 Howard, Sup. Ct. 20. See Averill *v.* Tucker, 2 Cranch, C. C. 544; Clark *v.* Great Barrington, 11 Pick. 260; Mechanics and Traders' Bank *v.* Hodge, 3 Robinson (La.), 373.

[2] Wendell *v.* Pierce, 13 New Hamp. 502.

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hands the defendant's, but the principal's. The only way to reach it is by garnishment of the principal.[1] The case is different, however, where the money is collected for the defendant by *his* agent. There, the agent is in direct privity with the defendant, and the money in his hands is the defendant's, and he may be charged as garnishee in respect thereof.[2]

§ 515. *Attorneys at Law.* It seems to be generally conceded that persons practising as attorneys at law, and holding money of their clients, are not protected by their legal capacity from garnishment, but are considered liable in respect of money so held by them, even though their clients could maintain no action against them for the money until the payment of it should have been demanded.[3]

§ 516. *Municipal Corporations.* These bodies have not escaped the efforts of creditors to reach the moneys of debtors. Their liability to garnishment has been differently regarded in different States. In New Hampshire, under a statute extending the operation of an attachment to "any corporation possessed of any money," &c., of the debtor, it was held that a *town* might be garnished.[4] In Connecticut, where the statute provides that "debts due from any person to a debtor" may be attached, the same view was entertained as to the same description of corporation;[5] though in that State it had been previously held that a *county* could not be charged as garnishee.[6] This decision, however, was stated to have rested on the position that a county could not contract a debt for which an action would lie against it, and was held not to be inconsistent with the views which controlled the court in sustaining the garnishment of a town.[7] In Iowa it was held, that an incorporated city might be charged as garnishee, for money due to a defendant for public work done by him for

[1] Neuer *v.* O'Fallon, 18 Missouri, 277; Briggs *v.* Block, Ibid. 281; Barnard *v.* Graves, 16 Pick. 41; Huntley *v.* Stone, 4 Wisconsin, 91.

[2] Kennedy *v.* Aldridge, 5 B. Monroe, 141.

[3] Staples *v.* Staples, 4 Maine, 532; Woodbridge *v.* Morse, 5 New Hamp. 519; Coburn *v.* Ansart, 3 Mass. 319; Thayer *v* Sherman, 12 Ibid. 441; Riley *v.* Hirst, 2 Penn. State, 346; Mann *v.* Buford, 3 Alabama, 312; Tucker *v.* Butts, 6 Georgia, 580.

[4] Whidden *v.* Drake, 5 New Hamp. 13.

[5] Bray *v.* Wallingford, 20 Conn. 416.

[6] Ward *v.* Hartford, 12 Conn. 404.

[7] See remarks of STORRS, J., in Bray *v.* Wallingford, 20 Conn. 416.

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the city.[1] In Vermont, on the contrary, it was held, that a town was not subject to garnishment,[2] and in Missouri, Maryland, Alabama, and Wisconsin, that a city could not be charged as garnishee;[3] and in Minnesota, that a county cannot be garnished.[4] Thus the question stands, so far as the adjudications are concerned. The argument in favor of holding such bodies as garnishees, is derived from the policy of the law which subjects all of a debtor's property to the payment of his debts; while the adverse argument is based on the inconvenience and impolicy of interfering with the operations of municipal bodies, by drawing them into controversies in which they have no concern, and diverting the moneys they have to pay, from the channel in which by the acts or ordinances of the corporation they are required to flow. The question may be considered as hardly yet fully settled, so far as inferior municipal organizations are concerned. Not so, however, where a State is attempted to be thus reached. This cannot be done, though its constitution require the legislature to direct by law in what courts and in what manner suits might be commenced against the State, and the legislature had passed laws to that effect.[5]

In this connection may properly be mentioned a case which arose in Louisiana, where it was attempted to subject to attachment taxes due from individuals to a municipal corporation. On high principles of public policy, it was, in a learned and elaborate opinion, held that the proceeding was unauthorized and inadmissible.[6]

[1] Wales *v.* Muscatine, 4 Iowa, 302.

[2] Bradley *v.* Richmond, 6 Vermont, 121.

[3] Hawthorn *v.* St. Louis, 11 Missouri, 59; Fortune *v.* St. Louis, 23 Ibid. 239; Baltimore *v.* Root, 8 Maryland, 95; Mobile *v.* Rowland, 26 Alabama, 498; Burnham *v.* Fond du Lac, 15 Wisconsin, 193.

[4] McDougal *v.* Hennepin County, 4 Minnesota, 184.

[5] McMeekin *v.* The State, 9 Arkansas (4 English), 553; Bank of Tennessee *v.* Dibrell, 3 Sneed, 379.

[6] Egerton *v.* Third Municipality, 1 Louisiana Annual, 435. *Sed contra*, Smoot *v.* Hart, 33 Alabama, 69.

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CHAPTER XXIII.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY PREVIOUS CONTRACTS TOUCHING THE DEFENDANT'S PROPERTY IN HIS HANDS.

§ 517. THE liability of a garnishee in respect of property of a defendant in his hands, is to be determined ordinarily by his accountability to the defendant on account of the property. If by any pre-existing *bonâ fide* contract that accountability have been removed, or modified, it follows that the garnishee's liability is correspondingly affected. For it is well settled that garnishment cannot have the effect of changing the nature of a contract between the garnishee and the defendant, or of preventing the garnishee from performing a contract with a third person. Any other doctrine would lead to mischievous results.[1]

Therefore, where goods were shipped by the defendant to the garnishee, and a bill of exchange drawn on the garnishee, which, before the goods were received, was presented, and he refused to accept it, and it was returned to the drawers, and soon afterwards the goods arrived, and the garnishee called on the persons who had presented the bill to him, and told them if they would get the bill back he would pay it, and after this promise he was summoned as garnishee of the shippers of the goods, and in his answer admitted the possession of the defendant's goods, but set up his promise to pay the bill; it was held, that the promise

[1] The doctrine thus stated was cited, in terms, and adopted by the Court of Appeals of Maryland, in Baltimore & Ohio R R. Co. *v.* Wheeler, 18 Maryland, 372, where it was attempted to charge that company as garnishee, in respect of moneys received by it on account of the Central Ohio Railroad Company. The roads of these two companies terminated opposite to each other on the banks of the Ohio River, and an arrangement existed between the two companies for "through" transportation of goods and passengers, by the transfer thereof from one road to the other; each company receiving the fare or toll due for the other over both roads. In this way there were mutual accounts to be settled between the companies, for the receipts of each on the other's behalf; which were settled monthly, the balances being always in favor of the Baltimore & Ohio Company. The court held, that under such circumstances, moneys received by that company for the other were not subject to attachment, unless, upon a settlement of accounts between them, there should be found a balance in favor of the latter; and while the arrangement existed between them, as stated, it could not be broken up by an intervening attachment. The same doctrine, in effect, was previously enforced by the same court, in Poe *v.* St. Mary's College, 4 Gill, 499.

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was binding on him and gave him a lien on the goods, in virtue of which he was entitled to retain the goods for his indemnity.[1] So, where the garnishee had goods of the defendant in his hands on consignment, and, at the defendant's request, agreed to pay to a third person the amount of a bill of exchange of the defendant which had been protested, and which that third person had accepted for the honor of one of the indorsers thereon, and after making this agreement he was garnished; it was held, that his agreement was binding on him, and that he was entitled to retain out of the proceeds of the goods the amount of the bill which he had undertaken to pay.[2] So, where A. delivered goods to B., with directions to sell the same on his arrival in New Orleans, and pay the proceeds to C. D. and E., to extinguish, as far as they would go, a debt he owed them. On his arrival in New Orleans, B. placed the goods in the hands of C. D. and E., to sell, informing them of A.'s directions, and that, in conformity thereto, he would pay over the proceeds to them; to which they assented. Before the goods were sold they were attached by a third party as the property of A.; and it was held, that they were not subject to such attachment, because the promise of B. to C. D. and E. bound him to pay the proceeds to them, and A. could not, by a change of his determination, have compelled him to pay the money to any other person.[3] So, where one summoned as garnishee had, before the garnishment, in a transaction with the defendant, purchased from him goods, under an agreement, that, in consideration of the sale of the goods to him, he would pay off a mortgage on land which the defendant had previously executed, which was paid after the garnishment; it was held, that as the defendant could not lawfully, by any interference, prevent the garnishee from taking up the mortgage, so neither could the plaintiff by the operation of the attachment.[4] So, where one summoned as garnishee had received for the defendant an order on a town treasury for a certain sum, having previous to its receipt agreed with the defendant and a third person to whom the defendant was indebted, to deliver the order, when received, to that third person, and immediately after receiving the order

[1] Grant v. Shaw, 16 Mass. 341.

[2] Curtis v. Norris, 8 Pick. 280.

[3] Armor v. Cockburn, 4 Martin, N. S. 667; Cutters v. Baker, 2 Louisiana Annual, 372; Oliver v. Lake, 3 Ibid. 78; Burnside v. McKinley, 12 Ibid. 505.

[4] Owen v. Estes, 5 Mass. 330.

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he was garnished; the court held, that he was bound to deliver it according to his promise, and that the garnishment did not relieve him from his obligation.[1] So, where the garnishee had, previous to the garnishment, received from the defendant a sum of money and a note, in consideration whereof he agreed to enter a tract of land at the land-office for the defendant, and in pursuance of that agreement he had filed a land-warrant in said office, to be located for the defendant; and pending some delay in making the location, he was summoned as garnishee of the party from whom he had received the money, and thereupon desisted from any further effort to have the location made; it was held, that he could not be charged.[2] So, where a garnishee disclosed that certain creditors of the defendants having attached their property, it was, after the attachment, in pursuance of a written agreement, signed by the plaintiffs, the defendants, and the garnishee, put into his hands to sell, and apply the proceeds to the satisfaction of the executions that might be recovered, in the order of the attachments; and after the agreement was made, but before the property came into his hands, he was garnished; and after the garnishment he received the property and disposed of it according to the agreement: it was held, that the garnishee was not liable; the court considering that the garnishment "did not relieve him of his obligation to perform the contract into which he had entered. He received property of the defendants, it is true, but it was upon the express trust to dispose of it and discharge the liens upon it. He was, therefore, the agent of the creditors, to sell the property and account for the proceeds to them, with the assent of the defendants."[3]

§ 518. In Georgia this case is reported. Goods were deposited with a warehouse-man, who gave a receipt therefor, engaging to deliver them to *the holder* of the receipt; and he was summoned as garnishee of the party who made the deposit; and after the garnishment he delivered the goods to a third party holding the receipt, to whom they had been sold after that event; and attempted to avoid liability as garnishee, on the ground that his receipt was a negotiable instrument, and bound him to deliver the goods to anybody to whom it might be transferred: but the

[1] Mayhew v. Scott, 10 Pick. 54.
[2] Lundie v. Bradford, 26 Alabama, 512.
[3] Collins v. Brigham, 11 New Hamp. 420.

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court held, that the receipt was merely evidence of a contract of bailment, and not to be regarded as a negotiable security, and that the delivery of the goods by the garnishee, after the garnishment, was in his own wrong, and did not discharge him from liability.[1]

§ 519. The contract in relation to the effects in the garnishee's hands, which will affect his liability, must not only be entered into before the garnishment, but it must be his contract, and not that of another. Thus, A. sued B., and summoned C. as garnishee; and at the time of instituting the suit, an agreement was entered into between A. and B., as to the disposition which should be made of the funds in the garnishee's hands, when recovered. C., having knowledge of the terms of that agreement, without waiting for the action of the court as to his liability as garnishee, paid over the money in his hands to the persons to whom, by the agreement, it was to be paid when recovered, and set up this payment as a discharge of his liability as a garnishee. The court held, 1. That the contract between A. and B. was executory, and to operate only when the funds should be recovered from the garnishee; and 2. That the payment was unauthorized, and could not operate to discharge the garnishee; and he was accordingly charged.[2]

§ 520. A case occurred in New Hampshire, where A. and B. made a wager on the result of a Presidential election, and deposited the money in the hands of C., to be held by him until the 4th of March, 1841, on which day, in one event of the election, both sums were to be paid to A., and in the other event, to B. In December, 1840, C. was summoned as garnishee of A., and the question was, whether the money in his hands received from A., could be subjected to the attachment, notwithstanding the agreement of wager. The court mooted, but did not deem it necessary to decide, the question of the legality of the wager; and held, that a creditor of A. could not interfere with the agreement by taking the money out of the hands of C., without A.'s consent, unless A. was in insolvent or embarrassed circumstances.[3] The doctrine

[1] Smith v. Picket, 7 Georgia, 104.
[2] Webster v. Randall, 19 Pick. 13.
[3] Clark v. Gibson, 12 New Hamp. 386. See Wimer v. Pritchartt, 16 Missouri, 252.

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here advanced can hardly be deemed consistent with public policy and sound morals. The better view is that taken by the Supreme Court of Massachusetts, holding all wagers on the result of popular elections null and void, and the money in the hands of the stake-holder a mere naked deposit, respecting which the agreement to pay it over to one, according to the result of the pending election, is inoperative and void; and that, by implication of law, the money is deposited to the use of the depositors respectively, and the share of each is subject to attachment for his debts, at any time before it is actually paid over to the winning party.[1] After it is paid over, however, the winner cannot be charged as garnishee of the loser in respect thereof.[2]

[1] Ball v. Gilbert, 12 Metcalf, 397. [2] Speise v. M'Coy, 6 Watts & Sergeant, 485.

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CHAPTER XXIV.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY A PREVIOUS ASSIGNMENT OF THE DEFENDANT'S PROPERTY IN HIS HANDS, OR BY ITS BEING SUBJECT TO A LIEN, MORTGAGE, OR PLEDGE.

§ 521. A VERY common result of garnishment is, to bring the attachment in conflict with previous transfers of the defendant's property found in the hands of the garnishee, or with existing liens upon it. Hence have arisen numerous decisions concerning the effect of garnishment in such cases. This branch of the subject will be considered in reference to the following heads: I. Assignments, legal and equitable; II. Liens; III. Mortgages and Pledges.

§ 522. I. *Assignments, legal and equitable.* Where a garnishee holds property which once belonged to the defendant, but which, before the garnishment, was, for a valuable consideration, sold to the garnishee, the attachment of course cannot reach it. It is no longer the property of the defendant, but of the garnishee. In any such case, if the assignment be in writing, and bear date before the attachment, and there be nothing to repel the presumption that it bears its true date, it will be effectual as against the attachment, and no evidence of its delivery, or of its receipt and acceptance by the assignee, before service of the attachment, is necessary to perfect it and give it priority.[1]

§ 523. Where a garnishee sets up title in himself to the property in his hands, it is entirely competent for the plaintiff to impeach that title, on account of fraud, or other invalidating circumstance, and thereby show that the property is still liable for the defendant's debts.[2] And it is held in Louisiana, that he may call upon the assignee, whether he be the garnishee himself or a third party, to prove the consideration of the assignment. "The attaching creditor," observed the Supreme Court of that State, "cannot be deprived of his lien and the right resulting from it, unless by a person who has previously acquired the property of the thing at-

[1] Sandidge v. Graves, 1 Patton, Jr. & Heath, 101. [2] Cowles v. Coe, 21 Conn. 220.

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tached; and if the validity of the consideration be a necessary ingredient in the right of the assignee, the proof must come from him who alleges the assignment; for his opponents cannot prove a negative. It is clear of any doubt, that it is a *bonâ fide* assignment alone which can be successfully opposed to the attaching creditor; and if proof of the validity of the consideration could not be demanded, this would be tantamount to a declaration that a fraudulent or collusive assignment might have that effect."[1] And in New Hampshire, it was declared that the assignee, in order to maintain his claim against the attaching plaintiff, is bound not only to prove his claim to have been first in time, but also to have been well founded in legal right; and that the assignment was not merely formal, but *bonâ fide*, and upon sufficient consideration.[2]

Hence, where the firm of A. & Co., being insolvent, placed a number of demands in their favor in the hands of B., for collection, in order that he might take charge of the proceeds and keep them out of the reach of attachment, and pay a dividend out of them to such of A. & Co.'s creditors as were willing to discharge them; and B. accepted an order drawn by A. & Co., requesting him to pay the money which he might collect, to the order of C., one of the firm; and B., having collected a part of the money, lent it to different persons; and was afterward summoned as garnishee of A. & Co., at a time when he had nothing in his hands but some of the demands left with him for collection, and the notes which he had taken; and after the garnishment, in conformity with verbal orders from C., he paid a dividend to such of the creditors of A. & Co. as were willing to give a discharge; it was held, that this was an invalid transfer of property, for a purpose not recognized by law, and void against creditors; that the order of A. & Co. to pay the proceeds of the demands to C., was the same as if it had been drawn in favor of A. & Co.; and that the fact that the proceeds had been lent out and notes taken therefor, made no difference as to the liability of B., as garnishee of A. & Co., who became liable for the money received by him immediately upon its receipt, and could not avoid that liability by lending the money out; and therefore he was charged as garnishee of A. & Co.[3]

So, where A. was indebted to B., and B. procured C., for an

[1] Maher *v* Brown, 2 Louisiana, 492.
[2] Giddings *v.* Coleman, 12 New Hamp. 153.
[3] Hooper *v.* Hills, 9 Pick. 435.

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agreed premium, to guarantee the debt; and afterwards A. failed, and, at the suggestion of B., but without any knowledge of the previous guaranty, made an absolute transfer of property to C., to secure the debt to B., and after such transfer C. was garnished; the court held, that "the conveyance, instead of being made for the benefit of C., was evidently intended for the security of B. It was manifest that A., at the time of the transfer, had no knowledge that C. had guaranteed the payment; and between them therefore there was no privity, and no contract created by that guaranty. Had C. been called upon for the amount of the note, by reason of his separate stipulation, the payment of that amount would not, of itself, have given him a right of action against A. It was a distinct matter, collateral to the note, between other parties, and upon another consideration. There being therefore no consideration moving from C. for the conveyance of the property in question, he holds it as the trustee of A., and must be charged as such in this action."[1]

So, where a surety received from his principal property to secure him against his liabilities, and the principal afterwards made a settlement with the surety, in which he transferred to the surety his whole interest in the property for a grossly inadequate consideration, the settlement was held to be fraudulent against the creditors of the principal, and the surety was held as garnishee of the principal, in respect of the property received by him.[2] But in this case, as well as another in Massachusetts,[3] and one in New Hampshire,[4] where property was found in the garnishee's hands, under a contract that was fraudulent as to creditors, but the garnishee, before he was summoned, had, *bonâ fide*, paid debts of the defendant to an amount equal to the value of the property in his hands, he was held not liable in respect of the property.

§ 524. The rule, as stated in the preceding section, applies to a case where the assignee is before the court, and in a position to assert his rights, and to be called upon to defend them. Where this is not the case, it is not admissible to charge with fraud a transaction to which he was a party. Thus, where a garnishee answered, and admitted having made a note to the defendant, which he stated was assigned to a third party before the garnish-

[1] Knight *v.* Gorham, 4 Maine, 492.
[2] Ripley *v.* Severance, 6 Pick. 474.
[3] Thomas *v.* Goodwin, 12 Mass. 140.
[4] Hutchins *v.* Sprague, 4 New Hamp. 169.

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ment, and the plaintiff, on a contest of the answer, offered to prove that the assignment was fraudulent; it was held, that that question could not be tried in that proceeding, to which the assignee was not a party; for the judgment of the court establishing the fraud would not be conclusive upon him; and if not thus conclusive, the garnishee might be subjected to a double recovery.[1]

§ 525. In determining whether the property has in fact been assigned, the point to be ascertained is, whether the supposed assignor has so disposed of it that it is beyond his control. A mere direction from him to deliver or pay it to the supposed assignee, without his knowledge and assent, will not be considered to constitute an assignment, as against an attaching creditor of the assignor.[2] Thus, where A. sent to B. a quantity of gold-dust to be sold, and directed the proceeds to be paid to C., a creditor of A., and after the sale, and before the proceeds were paid over, B. was summoned as garnishee of A., it was held, that C. had acquired no interest in the proceeds, but they still were the property of A.[3] So, where, upon a consignment of goods to be sold on commission, the consignees accepted an order drawn upon them by the consignor, by which they were requested to pay to his order, in thirty days, the sum of one thousand dollars, *or* what might be due after deducting all advances and expenses, and after the acceptance, but before the goods were sold, the consignees were summoned as garnishees of the consignor; it was decided that the order, not being made to a third person, could not operate as an assignment, and neither was it a negotiable security; and therefore the garnishees were charged.[4] So, where attorneys at law collected money in a suit in the name of A., to the use of B., and were summoned as garnishees of A., and B. disclaimed any right to the money, they were charged.[5] So, where goods were shipped by A. to B., and A. afterwards drew a draft on B., in favor of a third party, against the consignment, which draft B. refused to accept, but expressed a willingness to pay the amount of it out of the proceeds of the

[1] Simpson *v.* Tippin, 5 Stewart & Porter, 208.

[2] Baker *v.* Moody, 1 Alabama, 315.

[3] Briggs *v.* Block, 18 Missouri, 281; Sproule *v.* McNulty, 7 Ibid. 62. See Brown *v.* Foster, 4 Cushing, 214; State *v.* Brownlee, 2 Speers, 519; People *v.* Johnson, 14 Illinois, 342; Dolsen *v.* Brown, 13 Louisiana Annual, 551; Robertson *v.* Scales, Ibid. 545; Hearn *v.* Foster, 21 Texas, 401.

[4] Cushman *v.* Haynes, 20 Pick. 182.

[5] Myatt *v.* Lockhart, 9 Alabama, 91.

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consignment; it was held, that such expression was insufficient to give the holder of the draft a right to the proceeds.[1]

§ 526. But where the appropriation of the property is made by the assignor and accepted by the assignee, the particular form in which the thing is done is of little moment, and the assignment will be sustained. Thus, certain funds were placed by A. in the hands of B., for the purpose of paying certain drafts drawn upon the fund, and the holders of the drafts knew that the fund was so placed for that purpose, and assented to it, by presenting their drafts, and receiving each a *pro rata* payment out of the fund. It was then attempted to reach the fund in the hands of B. by attachment against A.; but the court held, that it was assigned to B. for a particular purpose, and that the assent of the holders of the drafts having been given, there was an appropriation of it which could not be changed without their consent, and that B. was not liable as garnishee of A.[2] So, where A. received a sum of money from B. to pay over to C., and afterwards saw C., and informed him of having received it, but that he did not then have it with him, but would pay it to him; to which C. assented and requested A. to hold it for him, which A. consented and promised to do; it was held, that C.'s right to the money became absolute after his conversation with A., and paramount to an attachment against B., served after that time.[3]

§ 527. An equitable assignment will secure the property against attachment for the debt of the assignor, though no notice be given to the person holding the property, prior to the attachment, if it be given in time to enable him to bring it to the attention of the court before judgment is rendered against him as garnishee. Thus, A. being indebted to B., assigned to him a policy of insurance on goods at sea, which were afterwards lost. A creditor of A. garnished one of the underwriters, who had no knowledge of the assignment of the policy; and the question was whether the assignment, without notice to the underwriters, was good, so far as to vest a property in the assignee, and thus preclude an attach-

[1] Dolsen *v.* Brown, 13 Louisiana Annual, 551.

[2] Dwight *v.* Bank of Michigan, 10 Metcalf, 58. See Cammack *v.* Floyd, 10 Louisiana Annual, 351; Smith *v.* Clarke, 9 Iowa, 241.

[3] Brooks *v.* Hildreth, 22 Alabama, 469. See Burnside *v.* McKinley, 12 Louisiana Annual, 505.

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ment; and the court were unanimous in holding that the assignment, though made without the knowledge or assent of the underwriter, vested an equitable right in the assignee; and the garnishee was discharged.[1] So, where a judgment was obtained in the name of A., to the use of B., it was held not attachable in a suit against A.[2] So, where one held a power of attorney authorizing him to transfer to himself, as trustee, certain shares of bank stock to pay a debt due to him as trustee, it was held to be an equitable assignment of the stock.[3]

§ 528. Much more will an assignment be effectual, where notice of it has been given to the garnishee before the attachment. Thus, where the garnishees disclosed that they had collected money for the defendant, but before its receipt and before the garnishment, they had accepted an order drawn on them by the defendant in favor of a third person, for whatever sum they might collect; the order was held to be an assignment of the money, and the garnishees were discharged.[4]

So, where a bank was garnished, in respect of certain shares of its stock, standing in the name of the defendants on its books, but which, it appeared in evidence, had been sold and transferred by the defendants in England, by delivery of the certificate, with a power of attorney authorizing the transfer of the stock on the books of the bank, before the garnishment, though the stock was not transferred until afterwards; the court held, that the stock was equitably transferred before the garnishment, and in giving their opinion used the following language: "It cannot be denied, that a mere *chose in action* equitably assigned, is not subject to the operation of a foreign attachment instituted against the party whose name must necessarily be used at law for the recovery of the demand, and that an attaching creditor can stand on no better footing than his debtor. This abundantly appears from the English authorities, and the adjudications in our sister State courts, cited in the argument. A strong instance of this kind occurred

[1] Wakefield *v.* Martin, 3 Mass. 558. See Page *v.* Crosby, 24 Pick. 211; Balderston *v.* Manro, 2 Cranch, C. C. 623; Walling *v.* Miller, 15 California, 38; Haldeman *v.* Hillsborough & Cin. R. R. Co., 2 Handy, 101; Smith *v.* Clarke, 9 Iowa, 241.

[2] Davis *v.* Taylor, 4 Martin, N. S. 134.

[3] Matheson *v.* Rutledge, 12 Richardson, 41.

[4] Legro *v.* Staples, 16 Maine, 252; Adams *v.* Robinson, 1 Pick. 461; Nesmith *v.* Drum, 8 Watts & Sergeant, 9; Brazier *v.* Chappell, 2 Brevard, 107; Lamkin *v.* Phillips, 9 Porter, 98; Colt *v.* Ives, 31 Conn. 25.

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in this court in January term, 1793. John Caldwell brought a foreign attachment against Vance, Caldwell & Vance, and laid it on effects supposed to have been in the hands of Andrew & James Caldwell, who at one time were considerably indebted to them. Upon the plea of *nulla bona*, it appeared that a letter had been written authorizing Hugh Moore to receive this debt, and apply it towards payment of a debt due to Moore & Johnston; and the jury, under the direction of the court, being satisfied that it amounted to an equitable appropriation of the demand, found that the garnishees had no effects in their hands due to Vance, Caldwell & Vance. This court sanctioned the verdict by their judgment. In like manner a bond made assignable in its first creation, which requires by our act of assembly the ceremony of a seal and two witnesses to authorize the assignee to maintain a suit in his own name, if transferred *bonâ fide*, without seal or witnesses, is not liable to be attached for the debt of the obligee resident in a foreign country. This appears perfectly plain."[1]

§ 529. If a creditor attach goods which appear as the property of the defendant, but wherein another person has nevertheless an interest, which he communicates to the creditor before the attachment is laid, the creditor is bound to refund to such person his proportion of the money recovered under the attachment, notwithstanding the judgment of a competent court decreed the whole to the plaintiff as the property of the defendant.[2]

§ 530. Where it is provided by law, that, when a garnishee discloses an assignment of the debt to a third person, the supposed assignee may be cited to become a party to the suit, in order to test the validity of the assignment, a judgment declaring the assignment invalid is binding on the garnishee; and a judgment against him after a trial of the supposed assignment, would bar a subsequent action against him by the assignee.[3]

§ 531. The rights of conflicting assignments of the same effects cannot be tried in an attachment suit. Where, therefore, it appeared that there was an assignment to one person before the

[1] United States *v.* Vaughan, 3 Binney, 394.
[2] Bank of N. America *v.* M'Call, 3 Binney, 338.
[3] Fisk *v.* Weston, 5 Maine, 410; Born *v.* Staaden, 24 Illinois, 320.

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attachment, and to another afterward, it was held, that the conflict between the two assignments was an appropiate matter for the determination of a court of equity; but that, so far as the attachment was concerned, their existence only showed more fully that the defendant had no attachable interest, and the garnishee was discharged.[1]

§ 532. II. *Liens.* In its most extensive signification the term lien includes every case in which real or personal property is charged with the payment of any debt or duty; every such charge being denominated a lien on the property. In a more limited sense, it is defined to be a right of detaining the property of another until some claim be satisfied.[2] The law recognizes two species of lien, particular liens and general liens. Particular liens are, where a person claims a right to retain goods, in respect of labor or money expended on such goods; and these liens are favored in law. General liens are claimed in respect of a general balance of account; and are founded on express agreement, or are raised by implication of law, from the usage of trade, or from the course of dealing between the parties, whence it may be inferred that the contract in question was made with reference to their usual course of dealing.[3]

§ 533. If a garnishee having property of the defendant in his possession, has a valid lien thereon, as the defendant could not take the property from him without discharging the lien, so neither can a creditor take it by garnishment.[4] Therefore, where a garnishee to whom goods were consigned, had, before the garnishment, verbally agreed to pay to a third person, out of the proceeds of the consignment, a bill of exchange drawn by the consignor on the garnishee, it was held, that the promise was binding on him, and gave him a lien on the goods, which entitled him to retain them for his indemnity.[5]

§ 534. In South Carolina, before the enactment of the statute

[1] Shattuck *v.* Smith, 16 Vermont, 132.
[2] Bouvier's Law Dictionary.
[3] 2 Wheaton's Selwyn, 4th Am. Ed. 537.
[4] Nathan *v.* Giles, 5 Taunton, 558; Kirkman *v.* Hamilton, 9 Martin, 297; Nolen *v.* Crook, 5 Humphreys, 312; Smith *v.* Clarke, 9 Iowa, 241.
[5] Grant *v.* Shaw, 16 Mass. 341; Curtis *v.* Norris, 8 Pick. 280.

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to be referred to in the next section, it was held, that to enable a garnishee to retain goods of the defendant in his hands, it is not necessary that he should prove himself to be a creditor entitled to bring an action; but is enough if he establish a lien, even for outstanding liabilities incurred for the defendant. And it was there decided, that where an agent in that State, for a commission, negotiates exchanges for a house in New York, buys bills on Europe for them, and, to raise funds for that purpose, draws and sells bills upon them at home for corresponding amounts; some of which they accept, and others they do not, and the bills are protested; such agent has a lien on any funds or securities which come to his hands for his principal, to secure himself against his outstanding liabilities, although he have not in fact paid any of the bills. And there is no difference between bills accepted and not paid, and bills not accepted. The lien extends to all equally. Nor does it make any difference, that the funds and securities came to hand after the liability is incurred, and therefore were not looked to as an indemnity at the time.[1]

§ 535. In South Carolina, a statute provides, that if the defendant, whose property is attached in the hands of a garnishee, be really and truly indebted to the garnishee, then the garnishee, if his possession of the defendant's property was obtained legally and *bonâ fide*, without any tortious act, shall be first allowed his own debt. In such case, the garnishee is there styled "a creditor in possession"; and the effect of the statute is simply to give him a lien on the property in his hands for *any* debt due from the defendant to him, whether, by the general principles of law, he would have such lien or not. But the garnishee's claim must be a debt; not a mere liability, in virtue of which he may or may not be eventually subjected to loss. Therefore, it was held, that a surety not having paid the debt of the principal, is not entitled, when summoned as garnishee of the principal, to hold the effects in his hands as a creditor in possession.[2]

Under this statute, this case arose. A. sent an order to B. to purchase on his account a quantity of cotton, which B. purchased and forwarded; the last of it being sent on the 3d of September. On the 4th, 7th, and 8th of September, B. drew bills on A., payable on the 25th of November, which were accepted, but were

[1] Bank *v.* Levy, 1 McMullan, 431. [2] Yongue *v.* Linton, 6 Richardson, 275

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protested for non-payment. On the 27th and 28th of November, C. paid the bills for B.'s honor, and claimed and received reimbursement from B. On the 5th of December, a ship of A.'s, which had previously come consigned to B., was attached by a creditor of A., and B. claimed to hold the ship as a creditor in possession. Two questions were raised: 1. Whether, when the attachment was levied, A. was indebted to B.? and, 2. Whether B. had then, as consignee of the ship, such possession of her as to entitle him to the benefit of the statute? Both questions were decided in the affirmative; and the attachment declared inoperative as against B.[1]

§ 536. Whether the garnishee has a right to hold the defendant's property against an attachment, must depend upon the actual existence of a lien, as contradistinguished from mere possession. If he have no lien, legal or equitable, nor any right, as against the owner, by contract, by custom, or otherwise, to hold the property in security of some debt or claim of his own; if he has a mere naked possession of the property without any special property or lien; if the defendant is the owner, and has a present right of possession, so that he might lawfully take it out of the custody of the garnishee; the garnishee cannot claim to satisfy his debt out of it before the attachment can reach it;[2] but must attach it, as any other creditor, for his debt.[3]

§ 537. Where a garnishee has in his possession real and personal property of the defendant, both of which are liable to him for a debt of the defendant, he cannot, in the absence of fraud, be subjected as garnishee in respect of the personalty, and thereby compelled to look to the real estate for his security.[4]

§ 538. III. *Mortgages and Pledges.* A pledge or pawn is a bailment of personal property, as a security for some debt or engagement. A mortgage of goods is distinguishable from a mere pawn. By a grant or conveyance of goods in gage or mortgage, the whole legal title passes conditionally to the mortgagee; and if the goods are not redeemed at the time stipulated, the title becomes absolute at law, although equity will interfere to compel a

[1] Mitchell *v.* Byrne, 6 Richardson, 171.
[2] Allen *v.* Hall, 5 Metcalf, 263.
[3] Allen *v.* Megguire, 15 Mass. 490; Bailey *v.* Ross, 20 New Hamp. 302.
[4] Scofield *v.* Sanders, 25 Vermont, 181; Goddard *v.* Hapgood, Ibid. 351

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redemption. But in a pledge, a special property only passes to the pledgee, the general property remaining in the pledger. There is also another distinction. In the case of a pledge of personal property, the right of the pledgee is not consummated, except by possession; and ordinarily when that possession is relinquished, the right of the pledgee is extinguished, or waived. But in the case of a mortgage of personal property, the right of property passes by the conveyance to the pledgee, and possession is not, or may not be, essential to create, or to support the title.[1]

§ 539. The principle has been before laid down, that a garnishee can be rendered liable in respect of the defendant's property in his hands, only when the property is capable of being seized and sold under execution. Upon general principles, and in the absence of statutory interposition, an execution cannot be levied on a mere equity. The interest of a pledger or mortgagor in personalty pledged or mortgaged, is the mere equitable right of redemption, by paying the debt, or performing the engagement, for the payment or performance of which the property was pledged or mortgaged. Hence, personalty so situated is not subject to sale under execution, and, therefore, not attachable.[2]

It follows necessarily that the pledgee or mortgagee of personalty cannot be held as garnishee of the pledger or mortgagor, while the property is the subject of the pledge or mortgage.[3] Nor, if there be no agreement that he shall sell the property to pay the debt for which it is pledged or mortgaged, can he be compelled to do it;[4] but if there be such an agreement, and the property, in pursuance thereof, be sold, any surplus remaining after the payment of the debt secured may be reached by garnishment.[5] But in order to the mortgagee's immunity from liability as garnishee of the mortgagor, the mortgage must be for a debt incurred or liability encountered before the garnishment. While it is con-

[1] Story on Bailments, 4th Ed. § 286, 287.

[2] Badlam v. Tucker, 1 Pick. 389; Andrews v. Ludlow, 5 Ibid. 28; Holbrook v. Baker, 5 Maine, 309; Haven v. Low, 2 New Hamp. 13; Picquet v. Swan, 4 Mason, 443; Thompson v. Stevens, 10 Maine, 27; Sargent v. Carr, 12 Ibid. 396; Lyle v. Barker, 5 Binney, 457; Hall v. Page, 4 Georgia, 428.

[3] Badlam v. Tucker, 1 Pick. 389; Central Bank v. Prentice, 18 Ibid. 396; Whitney v. Dean, 5 New Hamp. 249; Hudson v. Hunt, Ibid. 538; Howard v. Card, 6 Maine, 353; Callender v. Furbish, 46 Ibid. 226; Kergin v. Dawson, 6 Illinois (1 Gilman), 86; Patterson v. Harland, 12 Arkansas, 158.

[4] Badlam v. Tucker, 1 Pick. 389; Howard v. Card, 6 Maine, 353.

[5] Badlam v. Tucker, 1 Pick. 389.

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ceded that a mortgage may be valid, containing a stipulation for securing future advances and liabilities on the part of the mortgagee, yet it will secure only such as have been made or assumed before other interests have intervened. After the mortgagee has been subjected to garnishment in an action against the mortgagor, no new and independent indebtment, either by moneys advanced or liabilities assumed, will defeat the lien of the attachment, or have a priority to the same under the mortgage.[1]

§ 540. Any relinquishment, however, of a lien, will open the way for the garnishment of the pledgee. Therefore, where a creditor who had property in his possession which he supposed to be pledged to him for the payment of a debt due him, was summoned as garnishee of his debtor, and afterwards caused the property to be attached by a writ in his own favor; it was held, that he had relinquished the lien he claimed to have had by the delivery of the property as a pledge, and was, therefore, subject to garnishment.[2]

[1] Barnard *v.* Moore, 8 Allen, 273.

[2] Swett *v.* Brown, 5 Pick. 178.

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CHAPTER XXV.

THE GARNISHEE'S LIABILITY AS A DEBTOR OF THE DEFENDANT. — GENERAL VIEWS. — DIVISION OF THE SUBJECT.

§ 541. We reach now the consideration of a garnishee's liability in respect of his indebtedness to the defendant, — a field of inquiry coextensive with that over which we have just passed, in relation to the kindred topic of his liability in regard to property of the defendant in his possession. The two subjects will be seen to have many principles in common. For instance, we have seen that, except in cases of fraudulent transfers, the garnishee's liability for the defendant's property in his possession, depends much upon whether the defendant has a right of action against him for the property. So, in order to charge a garnishee as a debtor of the defendant, it is a general principle — subject, of course, to exceptions — that the defendant shall have a cause of action, present or future, against him.[1]

§ 542. Pending the garnishment, the rights of the defendant are excluded and extinguished, only to the extent that may be necessary for the ultimate subjection of the debt or property in the garnishee's hands to the operation of the attachment. For every purpose of making demand, or securing his claim by attachment, or otherwise, the rights of the defendant remain unimpaired by the pendency of the garnishment. They subsist, however, in subordination to any lien created by that proceeding.[2]

§ 543. By the custom of London a plaintiff may, by garnishment, attach, in his own hands, money or goods of the defendant.

[1] Maine F. & M. Ins. Co. *v.* Weeks, 7 Mass. 438; White *v.* Jenkins, 16 Ibid. 62; Brigden *v.* Gill, Ibid. 522; Rundlet *v.* Jordan, 3 Maine, 47; Haven *v.* Wentworth, 2 New Hamp. 93; Adams *v.* Barrett, Ibid. 374; Piper *v.* Piper, Ibid. 439; Greenleaf *v.* Perrin, 8 Ibid. 273; Paul *v.* Paul, 10 Ibid. 117; Hutchins *v.* Hawley, 9 Vermont, 295; Hoyt *v.* Swift, 13 Ibid. 129; Walke *v.* McGehee, 11 Alabama, 273; Harrell *v.* Whitman, 19 Ibid. 135; Cook *v.* Walthall, 20 Ibid. 334; Kettle *v.* Harvey, 21 Vermont, 301; Patton *v.* Smith, 7 Iredell, 438; Lundie *v.* Bradford, 26 Alabama, 512; Hall *v.* Magee, 27 Ibid. 414; McGehee *v.* Walke, 15 Ibid. 183; Lewis *v.* Smith, 2 Cranch, C. C. 571.

[2] Hicks *v.* Gleason, 20 Vermont, 139.

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But can a plaintiff charge himself as garnishee, in respect of a debt due from him to the defendant, or can several plaintiffs summon one of their own number, with a view so to charge him? This question, in the latter aspect, came before the Supreme Court of Massachusetts, which declined expressly deciding it, because its decision was not necessary in the case, but gave a very distinct intimation of their views in the negative; considering it a novel experiment, and quite distinguishable from the case of a plaintiff holding money or goods of the defendant, and attaching them in his own hands.[1] In Louisiana, however, it was held, that it might be done.[2] In Tennessee, also, where the proceeding by attachment against non-residents is in chancery, this case arose. A., B., & C., as partners, were indebted to D., by note. D. sued on the note, and obtained judgment against A. & B., but not against C., who was a non-resident, and issued execution, which was returned *nulla bona;* A. & B. being insolvent. C. held a note made to him by D. & E., which, to avoid the claims of creditors, he transferred by assignment to F., a resident, without consideration and for the benefit of C. Suit was brought on this note by F., and judgment

[1] Belknap *v.* Gibbens, 13 Metcalf, 471. SHAW, C. J.: "Nor have we thought it necessary to express an opinion upon another question, considered in the argument, to wit, whether a plaintiff can summon himself, or whether several plaintiffs can summon one of their own number, as a trustee. It is, as far as we know, a novel experiment. The theory of the trustee suit, the provisions for securing the relative rights of plaintiff and trustee, the rights of appeal, and the general tenor of the law, seem to regard the suit, as between plaintiff and trustee, as an adversary proceeding, and to bring the case within the rule, that a person cannot sue himself, or be plaintiff and defendant in the same case. The ingenious argument for the plaintiff goes mainly on the ground, that the trustee process is in the nature of process *in rem*, and therefore it is quite immaterial whether the estate and effects to be affected by the attachment are in the hands of the plaintiffs, or one of them, or in those of a third person. This is true in regard to that branch of the statute which is designed to reach goods and chattels, so deposited that they cannot be reached by the ordinary process of attachment; but in such case, it is wholly unnecessary, because the plaintiff, holding any such goods, which are attachable, can deliver them to the attaching officer; as every trustee is obliged to do on execution, when he is charged on that ground. It is upon the other branch of the statute, affecting 'credits,' that the difficulty arises, where the purpose is to charge the trustee as the debtor of the defendant. The trustee is regarded as in some measure in privity with the defendant, and guardian of his rights. If, in his view, the judgment charging him as trustee is erroneous, and injurious to the defendant, it is his duty to appeal and take the opinion of this court. But in the present case, it would be an appeal by the trustee from a judgment in favor of the plaintiffs, he being one. Again; if he fail to pay over on execution, a *scire facias* must be brought by the trustee and his partners, to compel the trustee to pay the debt out of his own effects. In theory of law, it is an adversary suit; there is a conflict of rights between the plaintiff and trustee, bringing the case within the ordinary rule in regard to opposing parties."

[2] Grayson *v.* Veeche, 12 Martin, 688; Richardson *v.* Gurney, 9 Louisiana, 285.

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obtained against D. & E., and all the money paid to C., except an amount equal to the claim of D. against C. on the note of A., B., & C. While matters were in this position, D. filed his bill in chancery against C. and F., to subject the indebtedness of D. & E. to C., to the payment of D.'s debt to C., and the court sustained the bill.[1]

§ 544. That upon which the garnishment operates in this class of cases is *credits*. The term *credit*, in this connection, is used in the sense in which it is understood in commercial law, as the correlative of *debt*. Wherever, therefore, there is a credit, in this sense, there is a debt, and without a debt there can be no credit.[2] It was at one time attempted to hold by garnishment, not only debts due from the garnishee, but debts of others to the defendant, the evidence of which, as notes, bonds, or other *choses in action*, might be in the garnishee's hands; but as it is well settled that *choses in action* are not attachable,[3] the attempt failed, and it was held, that credits included only debts due from the garnishee to the defendant.[4]

§ 545. We have said that it is usually necessary, in order to charge a garnishee, that the defendant should have a cause of action against him. It will of course be understood that it is not every cause of action that will render a garnishee liable, but only

[1] Boyd *v.* Bayless, 4 Humphreys, 386. The following are the grounds on which the bill was sustained: "The single question in this case is, whether a complainant, to whom a non-resident is indebted, can, by virtue of the provisions of the Act of 1835-6, obtain a decree against his non-resident debtor, where the fund to be attached is in the hands of the complainant himself, or the debt or chose in action belonging to the non-resident is due from the complainant. We think, under such circumstances as are disclosed in this case, relief will be granted by virtue of the provisions of that act. If the non-resident, indeed, had with him the chose in action or note, nothing could be done. But where that is here, deposited in the hands of an agent, or transferred to a mere trustee for his benefit, the attachment will lie, and the fact that the complainant owes the money, any more than a third person, will not have the effect to obstruct the remedy given by the statute. If the note had been given by E. alone to C., and had been by C. assigned as stated to F., it would not be doubted, by any one, for a single moment, that this bill might have been filed. But the fact that it was given by D. & E. can make no difference in the view of a court of chancery; it, to be sure, in order to make the remedy effectual, under the circumstances of this case, requires that the court should enjoin the judgment of F., assignee, against D. & E. When the rights of the parties are determined, that becomes the appropriate mode of relief in this particular case." See Arledge *v.* White, 1 Head, 241.

[2] Wentworth *v.* Whittemore, 1 Mass. 471; Wilder *v.* Bailey, 3 Ibid. 289.

[3] Ante, § 481.

[4] Lupton *v.* Cutter, 8 Pick. 298.

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a cause of action for the recovery of a debt. Indeed, the rule announced in Alabama may be considered as authoritative, that no judgment can be rendered against a garnishee, when there is not a clear admission or proof of a legal debt due or to become due to the defendant;[1] a debt for which the defendant might maintain an action of debt or *indebitatus assumpsit*.[2] Therefore, where a stockholder in a corporation was summoned as garnishee, with a view to subject him to liability on account of the unpaid portion of his stock; and it appeared that he had, before the garnishment, paid all the calls which had been made upon the stock; it was held, that he could not be charged, because he was not liable to the corporation until a call should be made on him for payment.[3] So, where the municipal authorities of a city adopted a resolution laying out a public way, and embracing, among other things, a resolution that a certain sum should be awarded and paid to A.; it was held, that this was no debt of the city, for which A. could maintain an action, and therefore that the city could not be charged as his garnishee.[4] So, where A. received from B. a sum of money, and in consideration thereof executed to B. a bond, with sureties, to make to him, on or before a day named, a title to certain land; and before the time set for making the title, A. was summoned as garnishee of B. He answered stating the facts, and averring that he had not title to the land, and could not, therefore, make title thereto to B. It was sought to charge him as garnishee, in respect of his obligation to return the money to B.; but the court held, that he was not B.'s debtor for that sum, because the time named in the bond for making the title had not yet arrived, and A., if he failed to make the title, would be liable on his bond for damages, and B. might not choose to receive back the sum he had paid, as a discharge of his claim against A.[5] So, where a constable sold of a defendant's property more than sufficient to pay an execution, and took the note of the purchaser for the surplus, payable to the defendant, but without the defendant's consent, who did not receive the note; it was held, that the purchaser could not be

[1] Pressnall *v.* Mabry, 3 Porter, 105.

[2] Walke *v.* McGehee, 11 Alabama, 273; Harrell *v.* Whitman, 19 Ibid. 135; Cook *v.* Walthall, 20 Ibid. 334; Lundie *v.* Bradford, 26 Ibid. 512; Hall *v.* Magee, 27 Ibid. 414; Nesbitt *v.* Ware, 30 Ibid. 68; Powell *v.* Summons, 31 Ibid. 552.

[3] Bingham *v.* Rushing, 5 Alabama, 403.

[4] Fellows *v.* Duncan, 13 Metcalf, 332; Geer *v.* Chapel, 11 Gray, 18.

[5] Grace *v.* Maxfield 6 Humphreys, 328.

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charged as garnishee of the defendant, because the relation of debtor and creditor did not exist between them.[1] So, where a son, from filial duty, took his father and his family, who were poor, and had no other home, to his own house, and there supported them; and the father labored for the son while so living with him, and his services were worth more than the support furnished; but he had never claimed any further compensation, and the son had not expected to make any; it was held, that the son was not chargeable as garnishee of the father.[2] So, where a clerk of a court issued an attachment, under which property of the defendant was seized and sold, and the proceeds of the sale were paid into the hands of the clerk; and it was afterwards decided that the clerk had no authority to issue the writ, and that all the proceedings under it were void; and after that decision was given, creditors caused the clerk to be garnished, to subject the proceeds of the sale in his hands to their claims; it was decided that the clerk was not a debtor of the defendant.[3]

§ 546. As we have seen,[4] in regard to the liability of a garnishee for property of the defendant, there must be privity of contract and of interest between him and the defendant, in order to his being charged. The same rule applies to debts. Therefore, where the agent of a foreign insurance company was garnished, and it appeared that he had signed a policy of insurance, on

[1] Turner *v.* Armstrong, 9 Yerger, 412.

[2] Cobb *v.* Bishop, 27 Vermont, 624.

[3] Lewis *v.* Dubose, 4 Richardson, 219. The grounds of the decision were as follows "The defendants in the attachment may sue for and recover the property sold if it can be found, or may bring an action for the tort committed; or they may waive the tort and sue the clerk in assumpsit for the money arising from the sale of the property under the void attachment. But because the owners of the property wrongfully sold, might maintain an action of assumpsit to recover the proceeds of the sale, it does not follow that the money can be attached by the creditors. The creditors have no right to waive the tort, or to surrender the right to recover back the property, or to release the damages against the tort-feasor. Those are rights which appertain to the owner of property alone, and his creditors cannot defeat them by bringing a garnishment proceeding against him who may have the funds arising from the sale of the property. Until the owner has made his election to sue for the money, which may be done by bringing an action for it, the person having the money cannot, in any just sense, be deemed his debtor. To allow the money to be taken in attachment, might be productive of confusion and wrong. It could not prevent the owners of the property from suing for its recovery, or for the damages, and would yet concede to them the benefit of the appropriation of the money to the payment of their debts, and leave the clerk who received the money without the means of reimbursing the person against whom an action might be brought."

[4] Ante, § 490.

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behalf of the company, on property of the defendant, which was afterwards destroyed by fire, it was held, that he could not be charged, and the court said: "The respondent is simply the agent of persons in a foreign country. He contracted in that character with the defendant on behalf of his principals, and acknowledges nothing due from them to the defendant. The demand of the defendant is upon the copartnership in London, and if he had by action maintained that demand, and recovered a judgment against the copartnership, it would not follow that the respondent was answerable as his trustee. Indeed, no state of facts, which could arise out of the transaction stated by him, could fix him as trustee of the defendant."[1] So, where certain persons signed a contract as a building committee of a religious congregation; they were decided not to be liable as garnishees of the builder, because they were mere agents.[2] So, where a person purchased property at an administrator's sale, and gave his note therefor to the administrator, as such, it was held, that he could not be charged as garnishee of the payee of the note, on account of the payee's individual debt; the money, though payable to him, not being due to him in his individual, but in his representative, capacity.[3]

§ 547. A *legal* debt, as contradistinguished from an equitable demand, is that alone which will authorize a judgment against a garnishee, at least under any judicial organization which separates legal and equitable jurisdictions. Therefore, where it was attempted to charge a garnishee of A., by showing that the garnishee had executed a note to B., which, at the time of the garnishment was in the possession of A., but there was no proof that B. had indorsed the note, or that the garnishee had promised to pay it to A., it was held, that the court could not in this proceeding assume to settle the equitable rights of the parties to the note, and that the plaintiff could hold only such debts as the defendant could recover by action at law in his own name, that is, his legal rights as distinguished from equitable.[4]

[1] Wells *v.* Greene, 8 Mass. 504. See Smith *v.* Posey, 2 Hill (S. C.), 471; Lewis *v.* Smith, 2 Cranch, C. C. 571.

[2] Hewitt *v.* Wheeler, 22 Conn. 557. See ante, § 514.

[3] Lessing *v.* Vertrees, 32 Missouri, 431.

[4] Harrell *v.* Whitman, 19 Alabama, 135; Hugg *v.* Booth, 2 Iredell, 282; May *v.* Baker, 15 Illinois, 89; Barker *v.* Esty, 19 Vermont, 131. In Hoyt *v.* Swift, 13 Ver-

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§ 548. In no case where the claim of the defendant against the garnishee rests in unliquidated damages, can the garnishee be made liable. B. & P., partners, were summoned as garnishees of T., and it appeared that they had signed and delivered to T. a paper in the following words: "This may certify that if Mr. S. T. should wish to purchase of us tin-ware at our wholesale prices within twelve months from date, and should have O. P.'s note in his possession, we will take the same in payment." Within twelve months from the date of this instrument, T. presented to B. & P. four notes of O. P., and demanded their amount in tin-ware at wholesale prices, and B. & P. refused to comply with the demand. It was contended that on this state of facts B. & P. might be held as garnishees of T.; but the court decided that as T.'s claim was not a legal debt, but rested only in unliquidated damages, the garnishment could not be sustained.[1] So, a mere liability of the garnishee to an action on the part of the defendant for negligence or fraud, slander, assault and battery,[2] or for the wrongful conversion of the defendant's property,[3] or for the recovery from a creditor of usurious interest paid him by the defendant,[4] cannot be the foundation of a judgment against the garnishee. So, a liability of a constable to an execution creditor, for a breach of official duty in respect to the collection of the execution, cannot be attached in an action by a creditor of the person to whom the constable is so liable. The officer's liability in such case is for a specific breach of duty, a mere *tort*, and is no more subject to this process, than any other right of action in form *ex delicto*.[5] Much less can the securities in

mont, 129, COLLAMER, J., said: "The debt for which the trustee is pursued, must be a debt which the defendant could himself pursue at law. It is impracticable thus to enforce a mere equity claim. The want of chancery power in the county court, to call all the parties incidentally interested before them, and to pursue such a course as to determine their respective and conflicting rights, renders it impracticable. Otherwise, two or more copartners might be called in as trustees of another partner, and compelled to render an account of the whole copartnership, and strike the balance between themselves and their copartner, and thus wind up a long and intricate concern, without the intervention of an auditor or commissioner, and in the absence of their copartner; and all this, too, when the defendant could have sustained no action at law."

[1] Hugg *v.* Booth, 2 Iredell, 282; Deaver *v.* Keith, 5 Ibid. 374; Leefe *v.* Walker, 18 Louisiana, 1. See Rand *v.* White Mountain R. R., 40 New Hamp. 79.

[2] Rundlet *v.* Jordan, 3 Maine, 47; Foster *v.* Dudley, 10 Foster, 463; Lomerson *v.* Huffman, 1 Dutcher, 625.

[3] Paul *v.* Paul, 10 New Hamp. 117; Despatch Line *v.* Bellamy Man. Co., 12 Ibid 205; Getchell *v.* Chase, 37 Ibid. 106.

[4] Boardman *v.* Roe, 13 Mass. 104; Graham *v.* Moore, 7 B. Monroe, 53; Barker *v.* Esty, 19 Vermont, 131; Fish *v.* Field, Ibid. 141.

[5] Hemmenway *v.* Pratt, 23 Vermont, 332; Thayer *v.* Southwick, 8 Gray, 229.

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an officer's official bond, against whom an action might be maintained for his failure to pay over money collected by him on execution, be held as garnishees of the execution plaintiff.[1]

§ 549. A mere contract of indemnity, where no loss has been sustained by the party indemnified, cannot authorize the garnishment of the maker of the contract in a suit against such party. Thus, where an arrangement was made between A. and B., whereby A. was to give his notes to C. for certain goods purchased by B., and B. was to furnish A. with the money to pay the notes as they matured, and the notes were given, but before they matured, A. became insolvent, and failed to pay the notes, and afterwards B. was summoned as garnishee of A.; it was held, that his contract to indemnify A. was not, in the absence of a payment of the notes, or the sustaining of any damage by A., a ground for charging him, though it appeared that A.'s notes had been received by C. expressly in payment for the goods sold.[2] But where under a contract of indemnity a loss has occurred, and the party indemnified has a claim for such loss against him who engaged to indemnify him, the latter may be charged as his garnishee in respect of such loss, *if the contract furnish a standard by which the amount of the liability may be ascertained and fixed.* Thus, an insurance company may be so charged on account of a loss accruing under a policy of insurance issued by it; for the liability to the insured

[1] Eddy *v.* Heath's Garnishees, 31 Missouri, 141.

[2] Townsend *v.* Atwater, 5 Day, 298. In Downer *v.* Topliff, 19 Vermont, 399, a doctrine was maintained, which, so far as my observation extends, goes farther than any elsewhere announced, in reaching, through garnishment, a liability to the defendant. A. executed a bond to B., a constable, to indemnify him for having attached certain property in a suit in favor of A. *v.* C. After the attachment, D. sued B., the constable, for taking the property, and recovered judgment against him for its value, and in that action summoned A. as garnishee of B.; and the question was whether A. was liable as garnishee in respect of his having executed the bond of indemnification to B. ROYCE, C. J., in delivering the opinion of the court, said: "We think there is no sufficient ground for saying that the claim against the trustee, upon their bond to B., did not constitute a kind of indebtedness, at the time when this proceeding was commenced, which might well be reached by the trustee process. The bond was given to B., an officer, to indemnify him for having attached certain property, at the suit of the trustee A., as belonging to one C. And it is true, that, until a recovery was had against B. for the property, at the suit of D., who made good his title to it, the bond constituted but a contingent claim against the signers, and, as such, was excluded from the operation of the trustee process by express statute. But after B. had been thus damnified, and a clear and substantial cause of action arose upon the bond, the signers became fixed with an obligation, which was certain as to the liability, and uncertain only as to the amount for which they might be ultimately subjected. It was like any other indebtedness, where the amount is susceptible of dispute and controversy."

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clearly exists, and the policy furnishes the required standard. This has been held, not only as to adjusted claims for loss,[1] but also as to such claims unadjusted.[2]

§ 550. It may further be considered as settled, that the debt must be such as is due *in money*.[3] All debts, in the absence of contrary stipulations between the parties, must be paid in money. Therefore, where the garnishee acknowledged an indebtedness to the defendant, payable in mason's work and materials, it was decided that he could not be charged.[4] So, where the garnishee had given a bond to the defendant for "1,500 acres of land warrant, and 800 and odd dollars payable in whiskey."[5] So, where the garnishee had the defendant in his employ as a laborer, under an agreement that he should be paid in orders on another.[6] So, where the garnishee was indebted to the defendant in a certain sum to be paid in "store accounts."[7] And where payment was to be made in notes of the defendant to other persons, to be procured by the garnishee, he was held not to be liable.[8] And where one gave a note to another for a sum of money, "payable in boarding the wife and child" of the payee, it was decided that he was not chargeable.[9] And where one gave a note payable in the notes or obligations of a certain banking company, he was held not charge able for the amount in money, if he delivered up the notes, to be disposed of by the court.[10] In all these cases the courts proceeded upon the obvious principle, that they had no power to interfere with the contract between the defendant and the garnishee, and to make the latter pay in money, what he had agreed to pay, and the defendant had agreed to receive, in something else.[11]

Still we find in Maryland, that where a garnishee was indebted

[1] Boyle *v.* Franklin Fire Ins. Co., 7 Watts & Sergeant, 76; Franklin Fire Ins. Co. *v.* West, 8 Ibid. 350.

[2] Knox *v.* Protection Ins. Co., 9 Conn. 430; Girard Fire Ins. Co. *v.* Field, 45 Penn. State, 129; s. c. 3 Grant, 329.

[3] Mims *v.* Parker, 1 Alabama, 421.

[4] Wrigley *v.* Geyer, 4 Mass. 102.

[5] McMinn *v.* Hall, 2 Tennessee, 328. See Blackburn *v.* Davidson, 7 B. Monroe, 101; Smith *v.* Davis, 1 Wisconsin, 447.

[6] Willard *v.* Butler, 14 Pick. 550.

[7] Smith *v.* Chapman, 6 Porter, 365. See Blair *v.* Rhodes, 5 Alabama, 648.

[8] Mims *v.* Parker, 1 Alabama, 421.

[9] Aldrich *v.* Brooks, 5 Foster, 241.

[10] Marshall *v.* Grand Gulf R. R. & Banking Co., 5 Louisiana Annual, 360. See Jennings *v.* Summers, 7 Howard (Mi.), 453.

[11] Bartlett *v.* Wood, 32 Vermont, 372.

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to the defendant in a sum of money, payable, by express agreement, in work and labor, he was charged.[1] And in Massachusetts, it has been decided that the maker of a note payable in *horses*,[2] or in *goods*,[3] could be held as garnishee. This unusual decision, however, rests upon an express statutory provision, authorizing one who was, when served with process, "bound to deliver to the defendant, at a then future day, any specific article or articles whatsoever, other than money," to be declared garnishee of the defendant, and permitting him to deliver the specific articles to the sheriff, when execution should be issued against the defendant. And in Iowa it was held, that judgment might be rendered against a garnishee on account of a debt payable "in merchandise or trade"; but that the judgment should be a conditional one, for the amount of the garnishee's debt, but to be discharged in merchandise, at a fair value, to be placed at the disposal of the sheriff; on failure whereof the judgment, on motion, to become absolute, for which a general execution could issue.[4]

§ 551. The debt from the garnishee to the defendant, in respect of which it is sought to charge the former, must moreover be absolutely payable, at present or in future, and not dependent on any contingency. If the contract between the parties be of such a nature that it is uncertain and contingent whether anything will ever be due in virtue of it, it will not give rise to such a credit as may be attached; for that cannot properly be called a debt, which is not certainly and at all events payable, either at the present or some future period.[5] Therefore, where an attempt was made to attach, by garnishment of a ship-owner, the wages of a sailor employed on his ship, then at sea, and which had not arrived at any port of unlading, it was held, that, as it was uncertain whether the ship ever would arrive, and, therefore, whether anything would ever become due to the defendant, it could not be called a debt, and the garnishee was not therefore chargeable;[6] and this though the vessel had arrived just outside

[1] Louderman *v.* Wilson, 2 Harris & Johnson, 379.
[2] Comstock *v.* Farnum, 2 Mass. 96.
[3] Clark *v.* King, 2 Mass. 524.
[4] Stadler *v.* Parmlee, 14 Iowa, 175.
[5] Cushing's Trustee Process, 37; Roberts *v.* Drinkard, 3 Metcalfe (Ky.), 309; Russell *v.* Clingan, 33 Mississippi, 535; Bishop *v.* Young, 17 Wisconsin, 46; and the subsequent cases in this section.
[6] Wentworth *v.* Whittemore, 1 Mass. 471.

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of the harbor to which she was bound, and was, by grounding, prevented from entering it.[1] So, where there was a contract between the shipper of a cargo and the owner of the ship, that the latter should receive a share of the profits arising on the cargo, and, before the completion of the voyage, the shipper was summoned as garnishee of the owner, the court regarding it as contingent whether the ship would successfully terminate the voyage, or if so, whether there would be any profits on the cargo, considered that there was no debt capable of attachment.[2] So, where the garnishee had received from the defendants a bill of exchange, and gave a receipt therefor, promising to account to the defendants for the proceeds of the bill when received; and before the payment of the bill he was garnished; it was held, that, as it was contingent whether the bill would ever be paid, he could not be charged.[3] So, where one, acting for himself and as agent of others, left a part of a cargo, shipped on a vessel of which he was master, and in which he and the defendants were jointly interested, with merchants abroad, to be sold on his account, and the proceeds to be subject to his order, and took the receipt of the merchants to that effect, and while the goods were in this situation, he was summoned as garnishee of the other parties to whom jointly with him the goods belonged; it was decided, that the credit was a contingent one, and therefore not attachable.[4] So, where a lessee, who covenanted to pay rent quarterly, was summoned as garnishee of the lessor, he was held only for such quarters' rent as were due when he was summoned; all beyond that being considered contingent and uncertain.[5] So, where one received a bill of lading and an invoice of goods consigned to him, and, before the receipt of the goods, was garnished in a suit against the consignor, he was discharged, because it was contingent whether he would ever receive or accept the consignment.[6] So, where it appeared from the garnishee's answer, that he had employed the defendant as a broker to make a purchase of a cargo of lemons and oranges, with an agreement that the defendant should have one third part of the net profits upon a resale,

[1] Taber v. Nye, 12 Pick. 105.
[2] Davis v. Ham, 3 Mass. 33.
[3] Frothingham v. Haley, 3 Mass. 68.
[4] Willard v. Sheafe, 4 Mass. 235.
[5] Wood v. Partridge, 11 Mass. 488; Baltimore & Ohio R. R. Co. v. Gallahue, 14 Grattan, 563.
[6] Grant v. Shaw, 16 Mass. 341.

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and that, at the time of the garnishment, the whole proceeds of the resale had not been received; it was held, that it was uncertain and contingent whether there would, on closing the transaction, be anything due the defendant, and the garnishee was discharged.[1] So, where a garnishee held real estate of the defendant under a promise to sell and pay over the proceeds, it was held, that such a promise to pay over money was but an executory contract, and that there might be several contingencies, without the fault of the garnishee, that would prevent his owing money; and he was discharged.[2] So, where a contract existed between the garnishee and the defendant, by which the defendant was to be employed by the garnishee in a manufactory, for a salary, and was to deposit with the garnishee $300 to indemnify him against loss in the business, and, upon the dissolution of the contract, so much of the sum deposited as should not be required to indemnify the garnishee against loss was to be repaid to the defendant; it was held to be uncertain and contingent, when the garnishee was summoned, whether the defendant would ever be entitled to recover the $300 deposited, and that, therefore, the garnishee was not liable.[3] So, where a testator bequeathed to his wife "the use of thirty shares in the Oxford Bank; said shares, at her decease, to be equally divided between his heirs," and died, leaving several children, and his executor was summoned as garnishee of the husband of one of them; it was held, that the reversionary interest of any one of the children in these shares was contingent, and consequently not liable to be attached in the hands of the executor.[4] So, where the garnishee disclosed that the defendants, being indebted to him, had caused certain of their goods to be insured, and the policy required payment, in case of a loss, to be made to him, and that the goods were destroyed by fire, and before proof of the loss was made he was garnished; it was considered that his liability to the defendants was contingent, and he was discharged.[5] So, where a son gave a bond to his father for the payment of certain sums of money, and the delivery of certain quantities of provisions, at fixed times in each year during his father's life; it was held, that he could not be charged

[1] Williams v. Marston, 3 Pick. 65.
[2] Guild v. Holbrook, 11 Pick. 101.
[3] Faulkner v. Waters, 11 Pick. 473.
[4] Rich v. Waters, 22 Pick. 563. See Clement v. Clement, 19 New Hamp. 460.
[5] Meacham v. McCorbitt, 2 Metcalf, 352.

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as garnishee of the father for anything not actually payable at the time when he was garnished; all future payments being contingent, depending on the continuance of the father's life.[1] So, where a note was executed, payable on a contingency, and before it became payable absolutely the maker was summoned as garnishee of the payee; it was held, that the contingency not having happened upon which it would become absolutely due, he could not be charged.[2] So, where a consignee who had sold goods upon a credit, and guaranteed the sale, was summoned as garnishee of the consignor, before the expiration of the credit, it was considered that his undertaking was collateral and contingent, and that he could not be charged.[3]

§ 552. But while the proposition that a debt not actually and at all events payable, but depending on a contingency, cannot be attached, is sufficiently simple, the application of it to particular cases which raise the question of contingent or not, is not always of easy solution. "Thus much, however," in the language of the Supreme Court of Massachusetts, "may be considered as clear, that the contingency must affect the property itself, or the debt which is supposed to exist, and not merely the title to the property in the possession of the trustee, or his liability on a contract which he has actually made, but the force or effect of which is in litigation. Examples showing the distinction may be taken from the cases decided. Thus the wages of a sailor on board a vessel which has not arrived, are not liable to the process, because whether due or not depends on the arrival of the vessel.[4] So, shippers of a cargo, under contract with the owner of the ship that he shall have a share of the net profits arising on the cargo, are not liable as trustees until the termination of the voyage, as it is altogether contingent whether anything will ever be due.[5] There are many other cases of a similar character, but these two are sufficiently distinct, to show what is intended in the decisions by the term *contingent*, that is, an uncertainty whether anything will ever come into the hands of the trustee, or whether he will ever be indebted;

[1] Sayward *v.* Drew, 6 Maine, 263.
[2] Burke *v.* Whitcomb, 13 Vermont, 421.
[3] Tucker *v.* Clisby, 12 Pick. 22. See Bates *v.* New Orleans, &c. Railroad Co., 4 Abbott, Pract. R. 72.
[4] Wentworth *v.* Whittemore, 1 Mass. 471.
[5] Davis *v.* Ham, 3 Mass. 33; Cutter *v.* Perkins, 47 Maine, 557.

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the uncertainty arising from the contract, express or implied, between the debtor and the trustee. This principle has never been applied to a case where property is actually in the possession of the trustee, claimed by the debtor, his right to it being in controversy, nor to demands against the trustee himself in the nature of a debt due to the defendant, which, however, may be in dispute between them. In such cases the process is considered as attaching, and is postponed until a liability to the debtor is ascertained." [1]

Therefore, where the garnishee answered that he had a sum of money in his hands, the right to which was contested between the defendant and other parties, and had been submitted to referees, the court held, that here was no contingency as to the property, but merely as to the title, and that such contingency did not discharge the garnishee; and that the proceedings might be postponed until it should be ascertained to which party the money belonged.[2] So, where a garnishee had purchased certain property of the defendant, under a contract to pay for the same within a stipulated time, unless within that time he should elect to reconvey the property; and, before the expiration of the time, and before he had elected to reconvey the property, he was summoned as garnishee of the defendant, and objection was made to his being charged, on the ground that his liability depended on a contingency, which had not happened when he was garnished; it was held, that the case was not one of contingency such as to exempt the garnishee from liability.[3]

§ 553. As the attaching plaintiff can acquire no other or greater rights against the garnishee than the defendant has, it follows that, though the garnishee be indebted to the defendant, yet if there be anything to be done by the latter as a condition precedent to his

[1] Thorndike *v.* DeWolf, 6 Pick. 120; Dwinel *v.* Stone, 30 Maine, 384; Downer *v.* Curtis, 25 Vermont, 650.

[2] Thorndike *v.* DeWolf, 6 Pick. 120.

[3] Smith *v.* Cahoon, 37 Maine, 281. The following are the views of the court: "At the time of the service of the writ, P. (the garnishee) held in his hands the consideration of his contract with the defendant. By that contract he had his election to restore the property purchased, within a time not then expired, and thereby discharge his obligations to pay the stipulated price in money. He had either goods *or* credits in his hands. It was not uncertain, whether he had received absolutely the consideration of his contract, nor whether he was absolutely bound to fulfil that contract, by a return of the property received, or pay its agreed equivalent; but the manner in which he should discharge it was dependent on his choice. This is not the contingency referred to in

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recovering his debt in an action against the garnishee, the plaintiff cannot obtain judgment against the garnishee without performing the condition. Thus, where a railroad company was summoned as garnishee of one who had contracted to do work on its road, and it appeared that the contract under which the work was done provided that the contractor should not receive the amount of the final estimate of his work, until he should release, under seal, all claims or demands upon the company arising out of the contract; and at the time of the garnishment he had not executed such a release; it was held, that the company could not be charged as garnishee.[1] So, where an executor was garnished on account of a legacy bequeathed to the defendant, which the defendant could not have recovered without giving the executor a refunding bond; it was held, that the executor could not be charged as garnished until the plaintiff indemnified him.[2] So, where a party contracted to perform a specified amount of labor, and the performance thereof was, by the terms of the contract, a condition precedent to the right to recover pay therefor, and he voluntarily abandoned the work before it was completed, without fault upon the other side; it was held, that he was not entitled to recover a *pro rata* compensation for the amount of labor performed by him; and that the party for whom the work was done could not be charged as his garnishee in respect thereof.[3]

§ 554. The further consideration of the liability of a garnishee, in respect of indebtedness to the defendant, will be prosecuted in the succeeding chapters under the following heads: —

I. The garnishee's liability, as affected by the time when his debt to the defendant is payable.

II. As affected by his having co-debtors, and by the number of the defendants, and the number of his creditors.

the statute cited for the trustee. And in the cases relied upon in his behalf, the facts were such as to leave it uncertain, whether any goods, effects, or credits were in the hands of the supposed trustee at the time he was served with the process. In this case it was otherwise. The right to decide in which of the two modes provided he would fulfil his agreement, did not leave his liability in any degree contingent, and he cannot with propriety contend that he was not trustee. He had the power to signify his election to return the property, in which case he would hold the property subject to the trustee process, in the same manner that he would have done, had he been bound absolutely to return the property within the time specified in the contract."

[1] Baltimore & Ohio R. R. Co. *v.* McCullough, 12 Grattan, 595.

[2] Ross *v.* M'Kinny, 2 Rawle, 227.

[3] Kettle *v.* Harvey, 21 Vermont, 301

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III. His liability, as a party to a promissory note.

IV. His liability, as affected by pre-existing contracts with the defendant or third persons.

V. As affected by a fraudulent attempt by the defendant to defeat the payment of his debts.

VI. As affected by an equitable assignment of the debt.

VII. As affected by the commencement, pendency, and completion of legal proceedings against him, by the defendant, for the recovery of the debt.

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CHAPTER XXVI.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY THE TIME WHEN HIS DEBT TO THE DEFENDANT IS PAYABLE.

§ 555. THOUGH the doctrine is well settled, that where it is contingent whether the garnishee will ever owe the defendant money, he cannot be made liable, it by no means follows, that where there is a present debt, payable in the future, the same exemption exists. In a state of society where a system of credit is so extensively established as in this country, it would greatly impede the collection of debts, if no credits of a defendant could be reached but those actually due and payable at the time of the garnishment. Hence, in some States, it has been considered proper to provide by express enactment for the attachment of debts not falling due until after the service of the writ; though on general principles such provision would seem to be unnecessary, since the almost uniform current of decision has been in favor of the operation of the garnishment in such cases.

§ 556. In Tennessee, it has been held that a debt not due cannot be attached. In the case in which this decision was had, it appeared that the garnishee owed the defendant money, which was not due at the time of the garnishment, but became due between that time and the filing of the answer, and was paid at maturity. The court said: "By the provisions of the act, the person is summoned to answer what he is indebted at the time of the summons. There is no equitable construction by which the court can feel authorized to go beyond the words of the act, to reach a case of indebtedness; the act has been taken with strictness."[1] This is believed to be the only State in which this position is taken, and from the report of this case we are justified in supposing that the general principles bearing on the matter were not presented by counsel, or considered by the court. The court say: "The person is summoned to answer what he is indebted at the time of the sum-

[1] Childress *v.* Dickins, 8 Yerger, 113; M'Minn *v.* Hall, 2 Tennessee, 328.

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mons"; and, confounding indebtedness with time of payment, they consider that, because the debt was not actually due and payable at the time the garnishee was summoned, it was no debt. They overlook the fact that the law everywhere recognizes the existence of *debitum in præsenti, solvendum in futuro*, and that one who has engaged to pay another a sum of money at a future time is as much a debtor as he whose time of payment has already passed. It is sufficient to say, that this decision is adverse to the entire adjudications elsewhere, in England and this country, and must be considered as overborne by the weight of authority, as well as by principle.

§ 557. Thus, by the custom of London, money due to a defendant from a garnishee, but not payable at the time of the garnishment, may be attached, and judgment may be rendered in respect thereof at once, but no execution shall issue till the time of payment arrives.[1] The same doctrine has been announced in Maine,[2] Massachusetts,[3] Pennsylvania,[4] Maryland,[5] North Carolina,[6] Alabama,[7] and Arkansas,[8] and may be regarded as firmly established. And where the debt exists, but the time when it may become payable depends upon a notice to be given by the defendant to the garnishee, it may be attached, though no such notice have been given.[9]

§ 558. A singular case occurred in Vermont, where one summoned as garnishee had given the defendant a promissory note, in which was embodied a clause in these words: "I am at my option about paying the principal of this note, while I pay the interest annually." The garnishee claimed that this clause exempted him from liability, under a statute which provided that one may be held liable as garnishee for "money due to the principal defendant, before it has become payable," but "shall not be compelled to pay it before the time appointed therefor by the contract."

[1] Priv. Lond. 261, 262.
[2] Sayward *v.* Drew, 6 Maine, 263.
[3] Willard *v.* Sheafe, 4 Mass. 235.
[4] Walker *v.* Gibbs, 2 Dallas, 211; s. c. 1 Yeates, 255; Fulweiler *v.* Hughes, 17 Penn. State, 440.
[5] Stcuart *v.* West, 1 Harris & Johnson, 536.
[6] Peace *v.* Jones, 3 Murphey, 256.
[7] Branch Bank *v.* Poe, 1 Alabama, 396; Cottrell *v.* Varnum, 5 Ibid. 229.
[8] Dunnegan *v.* Byers, 17 Arkansas, 492.
[9] Clapp *v.* Hancock Bank, 1 Allen, 394; Nichols *v.* Scofield, 2 Rhode Island, 123.

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The court, however, very properly held otherwise, and charged the garnishee.[1]

§ 559. But in order to attach a debt payable *in futuro*, it must be a certain debt, which will become payable upon the lapse of time, and not a contingent liability, which may become a debt or not, on the performance of other acts, or the happening of some uncertain event. Thus, where the salary of a minister was payable quarterly, with an agreement that, if he entered on a quarter and did not complete it, nothing should be due for such service; and the minister, in the middle of a quarter, tendered his resignation, which was accepted; and the parish afterwards voted to pay him *pro rata* for the time of his service, after the commencement of the quarter; it was held, that the parish was not liable, as garnishee of the minister, on a process served after the resignation and before the passing of the vote; because when the process was served there was no debt, and the subsequent vote could not relate back so as to make a debt at that time.[2]

[1] Fay *v.* Smith, 25 Vermont, 610.

[2] Wyman *v.* Hichborn, 6 Cushing, 264. See Baltimore & Ohio R. R. Co. *v.* Gallahue, 14 Grattan, 563.

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CHAPTER XXVII.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY HIS HAVING CO-DEBTORS, AND BY THE NUMBER OF THE DEFENDANTS, AND THE NUMBER OF HIS CREDITORS.

§ 560. I. *His Liability as affected by his having Co-debtors.* Where several persons are jointly and severally liable for a debt, any one of them may be garnished, and subjected to a judgment for the whole amount of the debt, in the same manner that he might be sued by the defendant without his co-debtor being joined in the action.[1] But it is unadvisable in any case to garnish one of several joint and several debtors, without joining the others, if practicable; for a payment by one not garnished will certainly discharge the liability of the garnishee, whether made before or after the garnishment. Thus, where it appeared that the garnishee and another had executed a note to the defendant, promising to deliver to him at a certain time five tons of hay, and, before the note became due, one of the makers was garnished, and afterwards, when it became due, the other maker paid it, the court held this payment to be a discharge of the garnishee.[2]

§ 561. Where two or more persons are jointly liable for a debt, if part of them only are garnished, they may, in Massachusetts, take advantage of the non-joinder in abatement, but the process will not, because of the non-joinder, be considered wholly void.[3] In New Hampshire, however, where one was summoned as garnishee, and it appeared from his answer that he was not indebted to the defendant in his individual capacity, but as a partner in a firm, the other members of which were not joined with him in the writ, it was decided that, because of the non-joinder of the other

[1] Travis *v.* Tartt, 8 Alabama, 574; Speak *v.* Kinsey, 17 Texas, 301; Macomber *v* Wright, 35 Maine, 156.

[2] Jewett *v.* Bacon, 6 Mass. 60. See Robinson *v.* Hall, 3 Metcalf, 301.

[3] Hathaway *v.* Russell, 16 Mass. 473. But in such case the garnishee must take advantage of the non-joinder in the early stage of the proceedings. After his failure to answer, and the issue of a *scire facias* against him, consequent on such failure, he cannot set up this defence. Hoyt *v.* Robinson, 10 Gray, 371.

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partner, the garnishee could not be charged.[1] And it was so held in Vermont,[2] in Iowa,[3] in Georgia,[4] and by the United States Circuit Court for the District of Columbia.[5] In Pennsylvania, however, while it is admitted that in common suits between creditors and debtors, the latter may plead in abatement that a partner was not named in the writ, yet that the reason of the plea in those cases does not apply to attachments; and such a plea by a garnishee was disregarded.[6]

§ 562. But where the garnishees were partners in a firm, part of the members of which resided in another State, and the names of all the members were contained in the writ, it was held that, as, if an action had been brought against them, a service on those within the jurisdiction would be sufficient, so the garnishment of the resident partners was sufficient to hold the funds of the defendant in the hands of the firm.[7]

§ 563. And in all such cases, as well where the co-debtors not summoned reside within the State, and the garnishees do not object on that account to answer,[8] as where those not summoned reside out of the State,[9] if it appear by the answers that time is wanted to ascertain the condition of the funds, or the liability of any of the other partners, who are not summoned, on account of any acceptance or engagement they have entered into, or of any suit brought against them, the process will be stayed, until full information can be obtained.[10]

§ 564. There is, however, a case which constitutes an exception to the rule that resident partners may be garnished and the funds in the hands of the firm thereby attached, though other members of the firm reside in another State. The exception is, where part

[1] Rix *v.* Elliott, 1 New Hamp. 184; Hudson *v.* Hunt, 5 Ibid. 538; Atkins *v.* Prescott, 10 Ibid. 120.
[2] Pettes *v.* Spalding, 21 Vermont, 66.
[3] Wilson *v.* Albright, 2 G. Greene, 125.
[4] Hoskins *v.* Johnson, 24 Georgia, 625.
[5] Ellicott *v.* Smith, 2 Cranch, C. C. 543.
[6] Brealsford *v.* Meade, 1 Yeates, 488.
[7] Parker *v.* Danforth, 16 Mass. 299; Atkins *v.* Prescott, 10 New Hamp. 120; Warner *v.* Perkins, 8 Cushing, 518; Peck *v.* Barnum, 24 Vermont, 75.
[8] Hathaway *v.* Russell, 16 Mass. 473.
[9] Parker *v.* Danforth, 16 Mass. 299.
[10] Parker *v.* Danforth, 16 Mass. 299; Cushing's Trustee Process, § 92.

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of the firm reside in this country and part in a foreign country. There, it has been decided that the resident partners cannot be held as garnishees. The question arose on the following state of facts: P., a resident of Boston, and G., a resident of Havana, were general partners under the firm of P. & G., having a house established and doing business in the latter city. B., the defendant, deposited in the hands of G., at Havana, a sum of money, taking a receipt therefor in the name of P. & G. Afterwards P. was summoned in Boston as garnishee of B., and when he was summoned the money still remained in the hands of G., at Havana. The court, upon the following grounds, decided that P. could not be charged as garnishee: "The debt from the house to B. was contracted in Havana, and was there to be accounted for according to the terms of the receipt; and it would be attended with manifest inconvenience to commercial men, if, when they have received property on credit in one country, they could be held accountable to a stranger in another; when the terms upon which they received it might be satisfied abroad, without a possibility of showing it here.

"Besides, their creditor abroad may have the means of compelling payment in the country where the contract was made; and it is altogether unknown to us, whether a judgment of this court, founded on this process, would be respected by a foreign tribunal, who might have perfect evidence of the existence of the debt, without any satisfactory proof that it had ever been discharged.

"There is also a difficulty in considering one partner of a house as the trustee, when the other partner abroad may, without his knowledge, have discharged the debt, or come under some liability which would give the house an equitable lien upon it. Debtors, who are co-partners here, must all be summoned and made parties to the suit. It is true, this cannot be done where some of them have become domiciled abroad. But this difficulty will suggest doubts, whether a house so circumstanced can be lawfully made the subjects of this process. At any rate when the debt is contracted abroad, with a view to the agency of the foreign partner, or an expectation that it will be paid or negotiated by him, we think the partner at home cannot be charged as trustee."[1]

§ 564 *a*. Where a garnishment proceeding is instituted against a firm, the names of the individual members of it must be set out

[1] Kidder *v.* Packard, 13 Mass. 80.

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in the process. A proceeding against "the firm of A., B., & Co." charges no member of it.[1]

§ 565. Where several persons, members of a partnership, are summoned as garnishees, and one of them answers, admitting a debt due from the firm to the defendant, it is held, in Mississippi, that his answer will authorize a judgment against all the partners.[2]

§ 566. II. *His liability as affected by the number of the Defendants, and the number of his Creditors.* Where there are several defendants, the property of each is of course liable for the whole debt. In such case, therefore, if it appear that the garnishee is indebted to one or more of the defendants, though not to all, he will be charged.[3] But where a garnishee is indebted to several persons jointly, an important, and, in one of its aspects, a vexed, question arises, whether, in respect of that indebtedness, he can be charged, as garnishee of part of his creditors. This question will be considered under two heads: I. In relation to Partnerships; and II. In relation to other cases of joint creditors of the garnishee.

§ 567. I. *Partnerships.* The attachment of a debt due to a copartnership, in an action against one of the partners, is justly distinguishable from the seizure on attachment or execution of tangible effects of the firm for the same purpose. Hence we find the Supreme Court of Alabama holding, in the same case, that partnership property may be sold to pay the debt of one partner, but that a debt due to a firm cannot be taken by garnishment for that purpose. The reason assigned is, that, in the case of a sale, the property is not removed, and cannot be appropriated until all liens upon it, growing out of or relating to the partnership, are discharged; while in the other case, the judgment against the garnishee, if acquiesced in, changes the right of property, and devests the copartner's title to the property attached; which cannot be done so long as the partnership accounts remain unsettled,

[1] Reid *v.* McLeod, 20 Alabama, 576.

[2] Anderson *v.* Wanzer, 5 Howard (Mi.), 587.

[3] Thompson *v.* Taylor, 13 Maine, 420; Stone *v.* Dean, 5 New Hamp. 502; Parker *v.* Guillow, 10 Ibid. 103; Caignett *v.* Gilbaud, 2 Yeates, 35; Locket *v.* Child, 11 Alabama, 640.

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or its debts unpaid.[1] Much force is given to this reason, when it is remembered that garnishment is essentially a legal proceeding, and not adapted for the ascertainment and settlement of equitable rights between the garnishee and the defendant; and that a court of law has no power to impound the debt, until, by an adjustment of all the partnership affairs, it shall appear whether the defendant has any and what interest in the general surplus, or in the particular debt so impounded.[2]

§ 568. In Massachusetts, this question came up for decision at an early day, and the court, while deciding that the garnishee could not be charged, intimated that if a partner of the firm were summoned, and disclosed that the defendant had an interest in the partnership effects after all the partnership debts were paid, the garnishee might be held.[3] There are, however, great and apparently insuperable difficulties in the way of such an investigation, which will immediately occur to the legal mind, and demonstrate its impracticability. The same point came up before Justice STORY, on the circuit, in a case where, in a suit against G. & G., the garnishee answered that he was indebted to G. & L.; one of the defendants being a member of both firms. The court, in deciding against the liability of the garnishee, observed: "In order to adjudge the trustee responsible in this suit, it must be decided, that the funds of one partnership may be applied to the payment of the debts of another partnership, upon the mere proof that the principal debtor has an interest in each firm. If this be correct, it will follow that a separate creditor of one partner will have greater equitable, as well as legal rights, than the partner himself has. The general rule undoubtedly is, that the interest of each partner in the partnership funds is only what remains after the partnership accounts are taken; and unless upon such an account the partner be a creditor of the fund, he is entitled to nothing. And if the partnership be insolvent, the same effect follows."[4]

§ 569. In Connecticut, this subject was elaborately and ably

[1] Winston v. Ewing, 1 Alabama, 129.

[2] Johnson v. King, 6 Humphreys, 233.

[3] Fisk v. Herrick, 6 Mass. 271; Upham v. Naylor, 9 Ibid. 490; Hawes v. Waltham, 18 Pick. 451; Bulfinch v. Winchenbach, 3 Allen, 161.

[4] Lyndon v. Gorham, 1 Gallison, 367. See Upham v. Naylor, 9 Mass. 490.

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considered, in a case where there were three members of a firm to which the garnishee was indebted, and he was garnished in a suit against one of them. There the court said: "The creditor can, by a foreign attachment, take nothing but what the absconding debtor was entitled to; and the property of one man ought not to be taken to pay the debt of another. But the rule claimed by the plaintiffs would violate both these principles. It is well known, that in partnerships, the effects do not usually belong to the partners equally, in proportion to the number. Sometimes, one will advance the capital, which is to be returned, while the other is to transact the business, and the profits only are to be shared between them. The effects might be wanted, not only to pay the partnership debts, but, on a settlement of the accounts, the partner in the execution might be a debtor of the partnership. If, then, we consider them tenants in common, and permit a creditor to sell one half to pay the separate debt of one partner, we shall, in many instances, suffer the property of one man to be taken to pay the debts of another; and give to a separate creditor of a partner a right over the effects of a partnership, which such partner could not exercise; and if the purchaser should be allowed to take possession of the effects, he might dissolve or destroy the partnership.

"It may be asked, on what ground could the judgment in this case be rendered for *one third* of the debt due from the defendants to the partnership, of which the absconding debtor was one? There was no evidence respecting the state of the partnership concerns; what capital each partner advanced; what each owned; and whether the partnership was solvent. Suppose the whole debt due from the garnishee should be wanted, to pay the partnership debts; or that the defendant should be found a debtor, on settling his accounts; then the judgment could not be right. While the interest of the defendant was a matter of uncertainty, how could a judgment be rendered for a sum certain?

"It is, however, insisted that the garnishee is bound to state the accounts of the defendant with the partnership, and ascertain the balance due to the defendant. But this would be to require an impossibility; for he has no control of their books, and no possible legal mode of compelling a settlement of their accounts.

"It is further said, if the plaintiffs have recovered more than

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the proportion of the defendant in this debt, and it should be wanted for the payment of partnership debts, the other partners may call them to account, and recover back such money. At this rate, a judgment may be rendered in favor of a man for a sum certain, with a liability to refund the whole, or a part of it, on some contingency. It is sufficient to state the proposition, to show the absurdity of it. What right can a court have to say, that a certain part of a debt due to a partnership may be taken to pay the private debt of a partner, in a suit where the partners are not parties; and then, if wanted to pay the debts of the partnership, to oblige them to resort to the creditor?

"But it further appears to me, from the nature of partnerships, that one partner cannot have a separate right in any particular debt, or article of property, belonging to the partnership, liable to his individual debt; but all the effects are a joint interest; and each partner can have a separate interest only in his share, upon the winding up and settlement of the partnership concerns."[1]

§ 570. The position taken in the decisions which have been referred to, is supported by the courts of New Hampshire,[2] Vermont,[3] Louisiana,[4] Mississippi,[5] Tennessee,[6] and Missouri.[7] In Pennsylvania,[8] Maryland,[9] and South Carolina,[10] the contrary doctrine prevails; but in the reported cases in those States we look in vain for any substantial foundation of reason or expediency upon which it can rest, or for any views calculated to shake our confidence in the conclusion, that partnership credits can in no case be taken, by garnishment, to pay the individual debt of one member of a firm.

§ 571. But when the partnership has been dissolved by the death of one or more partners, leaving one survivor, it is con-

[1] Church *v.* Knox, 2 Conn. 514. See the able concurring opinion of BRAINARD, J., in this case.

[2] Atkins *v.* Prescott, 10 New Hamp. 120.

[3] Towne *v.* Leach, 32 Vermont, 747.

[4] Smith *v.* McMicken, 3 Louisiana Annual, 319; Thomas *v.* Lusk, 13 Ibid. 277.

[5] Mobley *v.* Lonbat, 7 Howard (Mi.), 318.

[6] Johnson *v.* King, 6 Humphreys, 233.

[7] Kingsley *v.* Missouri Fire Co., 14 Missouri, 467.

[8] M'Carty *v.* Emlen, 2 Dallas, 277; s. c. 2 Yeates, 190.

[9] Wallace *v.* Patterson, 2 Harris & M'Henry, 463.

[10] Schatzill *v.* Bolton, 2 M'Cord, 478; Chatzel *v.* Bolton, 3 Ibid. 33.

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sidered that, as the sole surviving partner is, in law, the owner of all the partnership effects, a debt due to the late partnership may be attached in an action against the survivor.[1]

§ 572. II. *Other Cases of Joint Creditors of the Garnishee.* An interesting question arises as to the liability of a garnishee, where he is indebted to two persons jointly, and is summoned as garnishee of one of them, when his joint creditors are not partners. This, it will be perceived, is a different case from that we have been considering, and may be sustained on principle.

In Maine, the following case arose. A. and B. contracted with C. to cut and haul lumber, and went on with the performance of the contract; and C., at the time of the garnishment, was indebted to them jointly in a certain sum of money. The question was, whether, in respect of that debt, C. could be charged as garnishee of A. alone; and the court said: "The alleged trustees in this case are the holders of funds, of which the principal debtor (the defendant) is entitled to a moiety. The defendant has it not in his power, without joining the party entitled with him, by any coercive process, to compel payment. The principal reason for the necessity of this joinder usually given is, that otherwise the party indebted might be liable to the cost and inconvenience of two suits upon one contract. Hence if he himself sever the cause of action, by paying one of his joint creditors his proportion, he is liable to the several creditor. So, the law, in carrying out its remedial provisions, may sever a contract, so as to subject the debtor to the liability of two suits upon one contract. The death of one of two jointly contracting parties, renders the survivor and the administrator of the deceased party each liable to a several suit. So, if the trustee be indebted to the principal in an entire sum, beyond the amount wanted to satisfy the judgment recovered by the attaching creditor, he will remain liable to the action of his principal for the residue. The trustee is but a stakeholder; and the law indemnifies him for the expense of the suit, by allowing him to deduct it, as a charge upon the fund in his hands. Notwithstanding, therefore, if the trustees are charged in this case, an entire liability will thereby be divided into two parts, in the judgment of the court this objection cannot prevail."[2] In Missouri, the same point was decided in a case where the garnishee

[1] Knox *v.* Schepler, 2 Hill (S. C.), 595. [2] Whitney *v.* Munroe, 19 Maine, 42.

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was the maker of a note payable to two jointly; but the court do not give at large the reasons for their decision.[1]

The same result was arrived at in Massachusetts, in a case where the garnishees had in their possession money belonging to A. & B., joint owners of a ship, the proceeds of the sale of a cargo of silks, and were garnished in an action against B. It was objected that the garnishees were not liable, because the money in their hands was the joint property of A. & B. On this point the court said: "This depends upon the question whether A. & B. are copartners; if they are, the objection is well taken, as was decided in the cases of Fisk *v.* Herrick, 6 Mass. 271, and Upham *v.* Naylor, 9 Mass. 490. These cases, however, relate to copartnerships, properly so called, and not to mere tenancies in common or joint ownerships of personal property; and the reason is that no one partner can have any separate interest in a copartnership debt, if he himself is indebted to the copartnership to an amount which will absorb his proportion; so that his share shall not be taken, until it shall be made to appear that it is free from the lien of the other partners. But it is not so with tenants in common of a ship, or persons jointly interested in a cargo, they not being partners, for they have no lien upon each other's share, and are not answerable for each other's debts. And this has been settled in several cases similar to the one before us.

"Now what is the interest of B. in the funds in the hands of the garnishees? A. & B. were the owners of a ship, and concerned together in a voyage. It is to be presumed that each furnished his share of the outward cargo. The ship brings home silks, which, by reason of A. & B. being ship-owners, become their property. They are tenants in common until the property is divided. When sold, they have the same interest in the proceeds. Neither can claim more than his share on account of debts due from the other. They have no lien. The consequence is, that a creditor of either may attach a moiety, and, when sold by a factor, though he may discharge himself by payment to either, if they united in the deposit, he is nevertheless debtor to each, and is answerable to the creditor of each when the funds are attached in his hands."[2]

[1] Miller *v.* Richardson, 1 Missouri, 310.

[2] Thorndike *v.* DeWolf, 6 Pick. 120. In Hanson *v.* Davis, 19 New Hamp. 133, the Superior Court of New Hampshire take the contrary ground. A. was summoned as trustee of B., and disclosed that he had executed certain notes to B. & C., jointly, and

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There is in Massachusetts a later case, which might seem to militate against this doctrine, and therefore demands notice.[1] A. & B. contracted with a town to erect a barn and do some other work, for a stipulated compensation. After the work was done, the town was garnished in two suits against B., and in its answers disclosed its indebtedness to A. & B. jointly, and judgments were rendered against it in respect of B.'s share of the debt. Afterwards A. & B. joined in an action against the town, and the judgments rendered against the town, as garnishee of B., were set up in bar *pro tanto* of the recovery. The court, after referring to the garnishments, say: "In each of those suits the town was charged, and a portion of the debt due to the plaintiffs jointly, was thus adjudged liable to be appropriated by process of law, to the payment of the several debt of one of them. This, we think, was erroneous. It seems to be now settled by authorities, that a joint debt cannot thus be severed and appropriated, in whole or in part, to discharge the several debt of one." In support of this broad and general proposition, the court refer to cases already herein considered, of attaching partnership credits for the debt of part of the firm, and then proceed with remarks which apply only to such a case. The case before the court is evidently treated as one of partnership; and the court conclude their opinion on this

that the payees were equally interested in them. The court said: "The question is, whether A. can be charged as trustee of the defendant for any, and for what part of the notes. We are of opinion that he cannot be charged for any part. The notes are due to B. & C., jointly, neither owning any particular note or part of the debt. If a payment is made to one, it is for the benefit of both, and the money is the money of both. The trustee, it is plain, cannot be charged for the whole note; and if he were to be charged for one half, that does not sever the joint property, and that half still belongs as much to C. as to the defendant. And if, after being so charged, the trustee were to become unable to pay the balance, C. ought to lose but one half of that, and would be entitled to recover of the plaintiff one half of what he had received; that is, if the attaching creditor had no greater right than his debtor. A trustee cannot be charged where the interest of the principal is merely a contingent interest. Here if the principal debtor, B., die, the note survives to C., the other payee, and he alone can enforce payment of it. B.'s interest is, therefore, contingent, and may become altogether extinguished. The rights of C., the other payee, are injuriously affected by this attachment. While this process is pending, how can C. sue for the residue, or enforce its payment? Must he wait until this suit is at an end, and then if the trustee is charged, as debtor of B., for one half of the notes, shall C. sue for the balance in his own name, or in the name of both? On the theory of the plaintiff, the trustee is to be charged as the debtor of B., for one half of the notes. B., then, has no longer any interest in the residue of the note. Yet how is C. to control and collect it, and what prevents B. from receiving it and giving a discharge? Upon the whole, we do not see how, consistently with the rights of the payees of these notes, the trustee can be holden, and he must, therefore, be discharged." See French *v.* Rogers, 16 New Hamp. 177.

[1] Hawes *v.* Waltham, 18 Pick. 451.

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branch of the controversy with these words: "It appears, by the answers of the town, that they were indebted to the two jointly, *without anything further appearing*. In such a case the court are of opinion that they could not be charged, in a suit against one only." We are left to the conclusion that, if it had appeared to the court that the debt was due to A. & B. jointly, but not as partners, the decision might have been otherwise. Whether, however, the court intended to give such an intimation, or not, it is quite certain that the question of the liability of a garnishee under such circumstances was not passed upon by the court.

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CHAPTER XXVIII.

THE GARNISHEE'S LIABILITY AS A PARTY TO A PROMISSORY NOTE.

§ 573. VARIOUS questions of interest arise in the consideration of this subject. The attempt to subject the maker of a promissory note to garnishment, in a suit against the payee, necessarily brings to light, in some of its aspects, serious difficulties. Principal among these is the danger that the maker, if subjected as garnishee, may, without any fault on his part, be compelled to pay the amount of the note a second time. That such a result is possible, is enough in itself to give importance to our present inquiries. The subject will be considered, I. In regard to unnegotiable notes, and II. With reference to negotiable notes.

§ 574. *Unnegotiable Notes.* By notes of this description are meant all notes which are not governed by the law merchant. Usually the maker is entitled to every defence against the payee, arising at any time before he receives notice of the assignment of the note. In some States, however, he can interpose between himself and a *bonâ fide* assignee, no defence which arose after the assignment was in fact made, though he had no knowledge of its having been made.

§ 575. Wherever notice of an assignment is required to be given by the assignee to the maker, there can be no good reason why the latter should not be held as garnishee of the payee, at any time before he receives such notice; but, on the contrary, unquestionable reasons why he should. He is indebted to the payee by written promise, and if in respect of that indebtedness he be charged as garnishee, he is in no sense injured thereby, for no assignment made after he is garnished can prevent his setting up as a defence against the note in the assignee's hands, his payment as garnishee, even though the assignee acquired title *bonâ fide*, and was ignorant of the garnishment.[1] In such case the *laches* of the assignee occasions his loss.

[1] Dore *v.* Dawson, 6 Alabama, 712; Robinson *v.* Mitchell, 1 Harrington, 365; Covert *v.* Nelson, 8 Blackford, 265; Comstock *v.* Farnum, 2 Mass. 96; Clark *v.* King, Ibid.

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§ 576. When the maker of an unnegotiable note is thus garnished, if he have received notice of an assignment of the note, made before the garnishment, he should state it in his answer; or if he be afterward notified of such antecedent assignment, in time to amend his answer before judgment is rendered thereon, he should make it known to the court; and if he fail to do so, he cannot avail himself of the payment of the judgment rendered against him as garnishee, in defence of an action brought by the assignee.[1] So, if he have been sued on the note by persons styling themselves assignees.[2] And it matters not whether the information he has received of an assignment be in fact true or false; it is equally his duty to make it known in his answer.[3] And if the garnishee, at any time before payment of the judgment against him, receive notice of an assignment made before he was garnished, and fail to take proper steps to prevent payment of the judgment, it is said that such payment will be in his own wrong, and will constitute no valid defence to the claim of the assignee.[4]

§ 577. These rules apply with equal force where, as at the common law, no action can be maintained on such notes except in the name of the payee, and where, as in many States, the assignee is authorized by statute to sue in his own name. In the latter case, the assignee is invested with a legal right, which he may enforce by an action at law, and it is therefore complete. In the former, the right is merely equitable, and not susceptible of enforcement by the assignee in his own name, except in a court of equity; but it is none the less, in this proceeding, entitled to the protection of the courts, which with great uniformity have sustained equitable assignments against attachment for the debts of the assignors.[5]

§ 578. What will be a sufficient statement of an assignment in

524; Junction R. R. Co. *v.* Cleneay, 13 Indiana, 161; Shetler *v.* Thomas, 16 Ibid. 223. In Alabama no notes are recognized as governed by the principles of the law merchant, but such as are made payable *in Bank.*

[1] Crayton *v.* Clark, 11 Alabama, 787; Foster *v.* White, 9 Porter, 221; Colvin *v.* Rich, 3 Ibid. 175; Cross *v.* Haldeman, 15 Arkansas, 200.

[2] Stubblefield *v.* Hagerty, 1 Alabama, 38; Smith *v.* Blatchford, 2 Indiana, 184.

[3] Foster *v.* Walker, 2 Alabama, 177; Wicks *v.* Branch Bank, 12 Ibid. 594.

[4] Oldham *v.* Ledbetter, 1 Howard (Mi.), 43.

[5] See Chapters XXIV. and XXXI.

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the answer of a garnishee must depend, to some extent, upon the force given to the answer under the system of practice in each State. In Massachusetts, at the time when the garnishee's liability was determined solely by his answer, and no extrinsic evidence, tending either to fix or defeat his liability, could, even with the consent of plaintiff, defendant, and garnishee, be introduced, it was held, that the assignee, in order to avail himself of the assignment, must exhibit to the garnishee, before he is examined, satisfactory evidence of a legal assignment, made before the attachment, in order that the garnishee may, in his answer, lay the evidence before the court.[1] The same rule prevails in Maine.[2] Hence, if such evidence be produced to the garnishee, and embodied in his answer, it follows that he cannot be charged, though it appear that the payee sold the note for the express purpose of absconding and defrauding his creditors.[3]

§ 579. Where, however, as is generally the case, the answer of the garnishee may be controverted and disproved; and more especially where, if the answer sets up an assignment of the note, the supposed assignee may be cited into court, and required to substantiate the assignment; it cannot be considered necessary for the garnishee to set forth in his answer the evidence of the assignment; it will be sufficient for him to state that he has received notice of it. And when he so states, no judgment can be rendered against him *on the answer*, whether the information he has received of the assignment be true or false. If the plaintiff suppose the notice, or the garnishee's statement of it to be false, the answer should be contested, and if not contested, the garnishee must be discharged; for it not only does not appear that he is indebted to the defendant, but the answer shows indebtedness to the assignee.[4]

[1] Foster *v.* Sinkler, 4 Mass. 450; Wood *v.* Partridge, 11 Ibid. 488.

[2] McAllister *v.* Brooks, 22 Maine, 80.

[3] Newell *v.* Adams, 1 D. Chipman, 346; Hutchins *v.* Hawley, 9 Vermont, 295; Burke *v.* Whitcomb, 13 Ibid. 421.

[4] Colvin *v.* Rich, 3 Porter, 175; Foster *v.* White, 9 Ibid. 221; Foster *v.* Walker, 2 Alabama, 177; Wicks *v.* Branch Bank, 12 Ibid. 594; Yarborough *v.* Thompson, 3 Smedes & Marshall, 291; Thompson *v.* Shelby, Ibid. 296; Cadwalader *v.* Hartley, 17 Indiana, 520. In Illinois it is held, that the mere statement by a garnishee in his answer, that he had, after his garnishment, been notified that his debt to the defendant had been assigned by the latter before the garnishment, without any evidence, or even the expression of an opinion, that the assignment was genuine, is not sufficient of itself to discharge the garnishee; but will justify the court in requiring the supposed assignee

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§ 580. In the class of cases to which we have attended, it will be seen that the fact of notice to the maker of the assignment is of first importance. But where, as in some States, the assignment of a note is *per se* operative and effectual, and no notice to the maker is required, how is the maker to be charged as garnishee of the payee, without liability to a second payment to the assignee? If, ignorant of any assignment, he, in his answer, admit an indebtedness to the defendant, and judgment be rendered against him, and afterwards an assignee of the note, under an assignment made before the attachment, claim its payment, can it be resisted? Shall the assignee be prejudiced by a proceeding to which he was no party, and of which he was ignorant? Or, shall he be required to give notice of the assignment, in order to prevent his money from being taken to pay another's debt, when the law vests the title fully in him, without the necessity of such notice? On the other hand, shall the garnishee be compelled to pay twice? These inquiries serve to illustrate the difficulty of charging the maker of a note which, though not negotiable by the law merchant, may yet be assigned without notice to the maker, so as to cut off any defence he might have against the payee, arising after the assignment, and before he comes to the knowledge of it. This difficulty was experienced by the Supreme Court of Missouri, at a time when the statute (since changed) gave the maker of an unnegotiable note a right of defence against the assignee, only in respect of matters which existed prior to the assignment; and led that court to the only safe conclusion, that such notes, as regards liability to attachment, must be regarded as on the same footing with negotiable paper.[1]

§ 581. The cases previously cited refer altogether to notes executed within the States where the decisions were made. A question of some interest is presented, where the maker of a note given or negotiated in a State where it is held to be negotiable, is garnished in a State where the same note would be considered unnegotiable. It has been ruled, that the character of the note, with reference to this proceeding, must be determined by the law

to appear and establish the genuineness of the assignment; in default of which, the judgment against the garnishee would be a bar to a subsequent action by the assignee Born *v.* Staaden, 24 Illinois, 320.

[1] St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Missouri, 421. See Speight *v.* Brock, Freeman, 389.

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of the State where it was given or negotiated; and that if negotiable there, the maker will not be charged as garnishee of the payee. Thus, where A., having, in Massachusetts, executed a negotiable note, payable there to B., was summoned in Vermont as B.'s garnishee, where the note would not be considered negotiable, it was held, that, inasmuch as it was by the *lex loci contractus* negotiable, and therefore not attachable, it could not be attached in Vermont by garnishing the maker.[1]

So, where A. executed in Pennsylvania, and delivered to B., in New York, a promissory note, which, by the law of the former State, was unnegotiable, but by that of the latter was negotiable, and, before the note became due, A. was summoned as garnishee of B., it was held, that, though the note was drawn in Pennsylvania, it was delivered and took effect in New York, and was liable to the law of that State, which gave it the effect of a foreign bill of exchange, and therefore the maker was exempted from garnishment on account of the payee.[2] And so, in Indiana, as to a note executed and payable in Ohio.[3] But where a resident of Vermont made a negotiable note to a resident of Massachusetts, payable at a bank in Vermont, where he could, under the statute, be subjected to garnishment in respect thereof, he was charged, because he resided, *and the note was payable*, in Vermont, though by the law of Massachusetts he could not have been charged.[4]

§ 582. II. *Negotiable Notes.* Any difficulties which, under any system, attend the garnishment of the maker of an unnegotiable note, in an action against the payee, are trivial compared with those which beset a like attempt in the case of a negotiable note; no notice of the transfer of which is necessary, and which is intended to pass from hand to hand as cash; each holder, before its maturity, feeling himself secure, and entitled to be secure, against any defence which the maker might have against the payee. The injurious results of subjecting such paper to attachment, have led, in some States, to its express exception, by statute, out of the operation of the process. In States where the statutes are silent on this point, the courts have differed in their views.

[1] Baylies *v.* Houghton, 15 Vermont, 626.
[2] Ludlow *v.* Bingham, 4 Dallas, 47. See Green *v.* Gillett, 5 Day, 485.
[3] Smith *v.* Blatchford, 2 Indiana, 184.
[4] Emerson *v.* Partridge, 27 Vermont, 8.

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§ 583. It is difficult to perceive any substantial justification of such a proceeding; while, obviously, it disregards principles which, by general consent, have been laid at the foundation of all attempts to subject garnishees to liability. It cannot be without benefit to recur to those principles in this connection. 1. Without dissent, it is impossible to charge a garnishee as a debtor of the defendant, unless it *appear affirmatively* that, at the time of the garnishment, the defendant had a cause of action against him, for the recovery of a legal debt, due, or to become due by the efflux of time.[1] 2. The attachment plaintiff can hold the garnishee responsible, (except in some few cases which have been referred to, and have no application here,) only so far as the defendant might hold him by an action at law. 3. The garnishee is, under no circumstances, to be placed by the garnishment in a worse condition than he would otherwise be. 4. No judgment should be rendered against him as garnishee, where he answers fairly and fully, unless it would be available as a defence against any action afterwards brought against him, on the debt in respect of which he is charged.

§ 584. Applying these well-established principles to this subject, it would seem quite impracticable to charge the maker of a negotiable promissory note, as a garnishee of the payee, so long as the note is still current as negotiable paper. This character it bears until it becomes due; and no operation which can be given to the garnishment of the maker, can change its nature in this respect.

§ 585. While the note is current as negotiable paper, it is usually very difficult for the maker to say whether, at the time of the garnishment, it was still the property or in the possession of the payee. If he answers that he does not know whether it was so or not, certainly he should not be charged, because it does not *appear affirmatively* that he was, when garnished, indebted to

[1] Ante, § 461; Wetherill *v.* Flanagan, 2 Miles, 243; Bridges *v.* North, 22 Georgia, 52; Allen *v.* Morgan, 1 Stewart, 9; Pressnall *v.* Mabry, 3 Porter, 105; Smith *v.* Chapman, 6 Ibid. 365; Mims *v.* Parker, 1 Alabama, 421; Foster *v.* Walker, 2 Ibid. 177; Fortune *v.* State Bank, 4 Ibid. 385; Connoley *v.* Cheeseborough, 21 Ibid. 166; Estill *v.* Goodloe, 6 Louisiana Annual, 122; Harney *v.* Ellis, 11 Smedes & Marshall, 348; Brown *v.* Slate, 7 Humphreys, 112; Davis *v.* Pawlette, 3 Wisconsin, 300; Wilson *v.* Albright, 2 G. Greene, 125; Pierce *v.* Carleton, 12 Illinois, 358; People *v.* Johnson, 14 Ibid. 342; Ellicott *v.* Smith, 2 Cranch, C. C. 543.

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the defendant; and unless that fact do so appear, no court can rightfully render judgment against him. The most that can be claimed is, that he *may* be so indebted, which is manifestly insufficient. The great fact necessary to charge him is not shown, but only conjectured. The whole matter is in doubt; and while in doubt the court cannot with truth record that the garnishee is found to be indebted to the defendant; and unless that be found by the judgment of the court, there is no ground for charging the garnishee.

This difficulty is not removed by resorting to the presumption that the debt, being shown to have once existed, still exists. Presumptions of that description are founded on the *experienced* continuance or permanency of a state of things, or a relation, which is found to have once existed. They are available only so far as experience shows the state of things, or the relation, likely to continue. When it is shown that *the nature of the subject* is inconsistent with the presumption, the presumption cannot arise. When, therefore, it appears that a garnishee, before he was summoned, made a negotiable note to the defendant, no presumption arises that he was, when garnished, a debtor of the defendant, in respect of that note, because the negotiable character of the note is given to it for the very purpose of its being negotiated, and experience teaches that such notes are not usually held by the payees until maturity, but are the subjects of incessant transfers by indorsement and delivery.

But though the garnishee should answer that the defendant, at the time of the garnishment, was the owner of the garnishee's note, not then due, no judgment should be rendered against him, because *his obligation is not to pay to any particular person, but to the holder, at maturity, whoever he may be.*[1] Can the garnishee, or the defendant, or the court, say that the defendant will be the holder of the note at its maturity? Certainly not; and yet to give judgment against the garnishee, necessarily assumes that he will be; or, in disregard of the contrary probability, holds the garnishee to a responsibility which he may have to meet again in an action by a *bonâ fide* holder at maturity.

It results hence that no such judgment can be rendered, without placing the garnishee in a worse situation than he would otherwise

[1] Sheets *v.* Culver, 14 Louisiana, 449; Kimball *v.* Plant, Ibid. 511; McMillan *v.* Richards, 9 California, 365; Gregory *v.* Higgins, 10 Ibid. 339.

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be in, by requiring him to pay to the plaintiff money which he may, and probably will, afterwards be compelled to pay again to an innocent holder of the note. It is no answer to this to say, that he may not be compelled to pay a second time; for the presumption from the character of the paper is the other way; and the mere liability to such second payment is sufficient to place him in a worse condition than he would otherwise be in. The only way to avoid this is to give the garnishment the effect of destroying the negotiability of the note; a proposition which bears on its face its own condemnation.

Finally, this proceeding clearly violates the undoubted principle that no judgment can properly be rendered against a garnishee, who fully and truly answers, unless it will avail him as a defence against any one who afterwards attempts to recover the same debt from him by action. This important rule can in no case be dispensed with, without manifest injustice to the garnishee. It is not sufficient that the garnishee *may* be protected; it is the duty of the court, with the whole case before it, to ascertain whether its judgment will be effectual to that end; and if it do not appear that it will, it should not be given. Manifestly, then, in this case, no judgment should be given against the garnishee, because it will not avail him as a defence to a suit by a *bonâ fide* holder, who acquires title to the note before its maturity. He is no party to the judgment; his rights are not passed upon by the court; and it is simply absurd to claim that he is concluded or affected by the judgment. And yet no court can consistently sustain the attachment of negotiable paper, while it is still current, without claiming for its judgment conclusive effect in favor of the garnishee against all the world, — in which case a *bonâ fide* holder may lose the amount of the note, — or leaving the door open for the garnishee to be compelled to pay the same debt a second time.

§ 586. The only expedient which has yet been suggested for avoiding the difficulties attending the garnishment of the maker of a negotiable note while current, originated with the Supreme Court of Missouri; by which it was at one time intimated,[1] (but afterwards expressly decided the other way,[2]) that an indorsee,

[1] Quarles *v.* Porter, 12 Missouri, 76; Colcord *v.* Daggett, 18 Ibid. 557.
[2] Funkhouser *v.* How, 24 Missouri, 44; Dickey *v.* Fox, Ibid. 217.

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having no notice of the attachment, might recover back from the attachment plaintiff the amount recovered by him from the maker, as garnishee of the payee. While it is admitted that this, at least, should be done for an indorsee under such circumstances, by the court which has arbitrarily seized upon his property, various inquiries at once arise. Why, and by what authority, is the legal recourse of the indorsee against the maker of the note thus summarily cut off, without his knowledge or consent? By what rule or precedent is a judgment to which he was no party, and of which he had no notice, interposed between him and his debtor? Upon what principle of law, or justice, or right, is his property appropriated to pay the debt of another? What right has any court, against his will, to destroy his relation of creditor to the maker of the note, and constitute him creditor of a stranger? What justice is there in compelling him to follow, perhaps to a distant State, the attachment plaintiff, to recover by legal resort that which the maker would have paid at home without such resort, if he had not been garnished? And when he seeks in a distant forum to enforce his claim against the attachment plaintiff, what guaranty is there that his right will be recognized? Until these questions are satisfactorily answered, consistently with established principles of law, it is difficult to see in the proposed expedient anything more than an unauthorized act of judicial legislation, framed to avoid, if possible, the evils flowing from the previous enunciation of an unsound doctrine.

§ 587. The foregoing considerations lead to the conclusion that, as a general rule, the maker of a negotiable note should not be charged as garnishee of the payee, under an attachment served before the maturity of the note, *unless it be affirmatively shown, that, before the rendition of the judgment, the note had become due, and was then still the property of the payee.*[1] Let us now examine the bearing of the adjudications on this subject.

§ 588. In several States, it has been decided, on principle, uninfluenced by statutory provisions, that the maker of a negotiable

[1] This rule was, in 1855, incorporated into the attachment law of Missouri; and my impression is that there is a tendency towards its adoption elsewhere by the judiciary. It seems to me to be the only one which can allow of the attachment of negotiable paper, without interfering with the rights of third parties; unless the suggestion of the Supreme Court of Pennsylvania, in Kieffer *v.* Ehler, 18 Penn. State, 388, *to impound the note,* should be adopted. See post, § 588.

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note shall not be charged as garnishee of the payee while the note is still current. In New Hampshire, the court said: "The reason of this rule is founded upon the negotiable quality of the paper. If the trustee could be charged in such a case, then it might happen that either a *bonâ fide* purchaser of the note must lose the amount of it, or the maker, without any fault on his part, be compelled to pay it twice. To avoid such a dilemma the rule was established." But, while announcing this general doctrine, the court charged the garnishee, because it appeared that the notes he had given the defendant were, at the time of the garnishment, in the garnishee's own hands, having, with other notes, been deposited with him by the defendant, to indemnify him for becoming the defendant's bail. In reference to this state of facts the court said: "When the process was served upon the trustee, he had the notes he had given in his own hands, and under his own control; and those notes could not be transferred to any other person in the ordinary course of business, while he then held them, nor can he be held to pay them again, if he shall be charged in this suit on that account. The reasons on which the rule is founded do not then appear to exist in this case."[1]

In Vermont, before the revision of the statutes, in 1836, it was held, that the maker of a negotiable note might be charged as garnishee of the payee, notwithstanding an assignment of the note before the attachment, unless notice of the assignment had been given to the maker.[2] The particular provision which justified this construction, was that the maker of a note, when sued by an indorsee, might not only have offsets of all debts due him from the payee *before notice of the indorsement*, but could give in evidence anything which would equitably discharge him in an action by the payee. By the statute of 1836, this provision was repealed in relation to negotiable notes, and the effect of the repeal was to put all negotiable notes on the footing of mercantile paper in a commercial country.[3] Thence followed a change in the decisions of the court; and it was afterwards held, that the negotiation of a note of this character, before it became due, required no

[1] Stone *v.* Dean, 5 New Hamp. 502. Since the decisions in New Hampshire stated in the text, a statute has been enacted in that State, which subjects the maker of a negotiable note to be garnished in a suit against the payee, at any time before the note is transferred. See Rev. Statutes of New Hampshire, of 1843, ch. 208, §§ 18, 19, and Amoskeag Man. Co. *v.* Gibbs, 8 Foster, 316.

[2] Britton *v.* Preston, 9 Vermont, 257.

[3] Hinsdill *v.* Safford, 11 Vermont, 309.

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notice to the maker, and would defeat an antecedent garnishment of him in an action against the payee.[1]

The same court subsequently took stronger ground, in a case where negotiable notes had been executed, and were not yet due, and the maker was summoned as garnishee of the payee; and said: "We ought not to hold the maker of the notes liable, unless he could rely upon this judgment as a complete defence against the notes. This he could not do, if, at the time of rendering the judgment, the notes had been already indorsed, and the indorsee was not before the court. We cannot know that this is not the case. But if we could know that the notes were now in the hands of the payee, in order to hold the maker liable, we must destroy the future negotiability of the notes, and thus put it in the power of the holder to impose upon innocent purchasers, or else enable the holder to defraud the maker by negotiating the notes after the judgment in the attachment suit. *There seems to be no other mode of securing the interests of all concerned, short of denying all right to attach, by this process, the interest in negotiable paper while current.*"[2]

In Pennsylvania, the distinction between negotiable and unnegotiable notes did not formerly prevail. All notes were there unnegotiable, though assignable in a particular manner prescribed by law. Whether the maker of a negotiable note could be held as garnishee of the payee, received, nevertheless, an early decision in that State, in the previously cited case of a note executed there and unnegotiable, but delivered to the payee in New York, where it was negotiable, and the maker of which was, before the maturity of the note, summoned as garnishee of the payee. The court there said: "There is no judgment or authoritative *dictum*, to be found in any book, that money due upon such a negotiable instrument

[1] Hinsdill *v.* Safford, 11 Vermont, 309; Little *v.* Hale, Ibid. 482.

[2] Hutchins *v.* Evans, 13 Vermont, 541. This decision was given in 1841, and in the same year the legislature of Vermont passed a statute subjecting *all negotiable paper* to attachment, whether under or over due, unless the same had not only been negotiated, but notice thereof given to the maker or indorser, before the service of trustee process on him. Williams's Compiled Statutes of Vermont, 262; Kimball *v.* Gay, 16 Vermont, 131; Chase *v.* Haughton, Ibid. 594; Barney *v.* Douglass, 19 Ibid. 98. And it is there held, that the indorsee of a negotiable note must give notice to the maker, of the indorsement, to perfect his right, and defeat an attachment; and that information of the fact of the indorsement, from a mere stranger to the paper, is not sufficient. Peck *v.* Walton, 25 Vermont, 33. And where a resident of Vermont was garnished, who had executed a negotiable note to a citizen of Massachusetts, payable at a bank in Vermont, he was held to be chargeable, although, by the law of Massachusetts, he could not have been. Emerson *v.* Partridge, 27 Vermont, 8.

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can be attached before it is payable; and in point of reason, policy, and usage, as well as upon principles of convenience and equity, we think it would be dangerous and wrong to introduce and establish a precedent of the kind. To adjudge that a note, which passes from hand to hand as cash; on which the holder may institute a suit in his own name; which has all the properties of a bank-note payable to bearer; which would be embraced by a bequest of money; and which is actually in circulation in another State; should be affected in this way, by a foreign attachment, would be, in effect, to overthrow an essential part of the commercial system, and to annihilate the negotiable quality of all such instruments."[1]

Subsequently the Supreme Court of this State somewhat modified this decided position. In 1836, a statute was enacted there, containing the following provision: "From and after the service of such writ . . . . . all debts and all deposits of money, and all other effects belonging or due to the defendant, by the person or corporation upon which service shall be so made, shall remain attached in the hands of such corporation or person, in the manner heretofore practised and allowed in the case of foreign attachment." In construing this provision, the court considered it broad enough to include debts due by bills of exchange and promissory notes, and that there is nothing in their nature that excludes them from its operation; but admitted that their negotiability renders the hold of an attachment upon them very uncertain; and held, that an attachment is unavailable against a *bonâ fide* holder, for value, of negotiable paper, who obtains it after attachment, before maturity, and without notice. At the same time, the court intimated that the negotiation of such paper by a defendant, after he has had notice of the attachment, is a fraud upon the law, and that the court had power to prevent this, by impounding the note, taking care that it should be demanded at maturity, and that proper notice should be given to indorsers, if necessary.[2]

In North Carolina, though it is held that debts due by negotiable paper may be attached,[3] yet in order to charge the maker of a

[1] Ludlow *v.* Bingham, 4 Dallas, 47.

[2] Kieffer *v.* Ehler, 18 Penn. State, 388; Hill *v.* Kroft, 29 Ibid. 186. The suggestion of impounding the note is an important one, and has not before met my observation. It is certainly a very effectual method, where it can be applied before the actual transfer of the note, and, if generally adopted, would do much toward defeating many fraudulent transactions that are covered by negotiable paper.

[3] Skinner *v.* Moore, 2 Devereux & Battle, 138.

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negotiable note as garnishee of the payee, it must be shown that the payee had not indorsed the note to some other person before its maturity; for otherwise it does not appear that the maker is indebted to the payee.[1]

In South Carolina, the court refused to charge the maker of a negotiable note, as garnishee of the payee, while the note was current, though the plaintiff offered to give security to indemnify the garnishee against the note. "The probability," said the court, "is so great that the absent debtor may have transferred negotiable notes, that it would be too great a hardship to compel the maker to pay the money, and resort to his indemnity, if he should be compelled to pay it over again."[2]

In Louisiana, it was decided, that the maker of such a note could not be charged before the note became due, whether in his answer he stated that he did not know who held his note, or that he knew the defendant was the owner of it at the time of the garnishment. "In this case," the court observed, "negotiable paper, supposed to belong to the defendant, is attempted to be attached, by interrogatories propounded to the maker, and upon the latter answering that he does not know by whom his notes are held, he is sought to be made liable as if he had actually declared himself indebted to defendant. Untenable as such a position would seem to be, an effort has been made to support it by argument. It is said the attachment was laid in the garnishee's hands before he had notice of the transfer of his notes, and a series of decisions of this court have been cited to show that the transferree of a debt is only possessed, as regards third persons, after notice has been given to the debtor of the transfer having been made; than this, there is, perhaps, no principle of our laws better settled; but it obviously applies only to credits not in a negotiable form. As to notes indorsed in blank, which circulate and pass from hand to hand by mere delivery, it has never been, nor can it be pretended, that any notice of transfer is necessary. If, then, no such notice is ever given, how is a garnishee who has issued his promissory note, indorsed in blank, to know in whose hands it happens to be at the precise moment when he is called upon to answer interrogatories? And if, perchance, he were to know that his note was still the property of the defendant, and were so to declare it,

[1] Myers v. Beeman, 9 Iredell, 116; Ormond v. Moye, 11 Ibid. 564.
[2] Gaffney v. Bradford, 2 Bailey, 441.

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could such a proceeding restrain its negotiability? Could it affect the rights of a *bonâ fide* holder? Surely not. The ownership of negotiable paper is incessantly varying, and the obligation of the maker of such instruments is not to pay to any particular person, but to the holder, at maturity, whoever he may be. Thus it is obvious that the garnishee, in this case, could give no other answer than that he has made, and it is equally obvious, that by pursuing this course, the plaintiffs have attached no property out of which their judgment can be satisfied."[1]

In Texas, it was first decided that the maker of a negotiable note *supposed* to have been negotiated, cannot be charged as garnishee of the payee;[2] and afterwards, that he cannot be charged at all, while the note is current as negotiable paper.[3]

In Indiana, it was held, that the maker of a note executed and payable in Ohio, and which by the law of Ohio was negotiable, could not be charged as garnishee of the payee, so as to defeat the right of an indorsee, acquiring the note before its maturity.[4] Afterward the court laid down the broad doctrine, that such maker could not be held as garnishee of the payee, without proof that the note actually remained, *at the time of the trial*, in the hands of the latter.[5]

In Wisconsin, the broad ground is taken, that the maker of a negotiable note cannot be held as garnishee of the payee.[6] And so in Michigan,[7] and Minnesota.[8]

In Iowa, the rule was laid down that the maker of a negotiable instrument cannot be charged as garnishee of the payee, unless the instrument has become due, and is shown to be, at the time of the garnishment, in the possession of the defendant.[9] And so in California.[10]

[1] Sheets *v.* Culver, 14 Louisiana, 449; Kimball *v.* Plant, Ibid. 511; Erwin *v.* Com. & R. R. Bank, 3 Louisiana Annual, 186.

[2] Wybrants *v.* Rice, 3 Texas, 458.

[3] Iglehart *v.* Moore, 21 Texas, 501; Price *v.* Brady, Ibid. 614; Bassett *v.* Garthwaite, 22 Ibid. 230.

[4] Smith *v.* Blatchford, 2 Indiana, 184.

[5] Junction R. R. Co. *v.* Cleneay, 13 Indiana, 161; Stetson *v.* Cleneay, 14 Ibid. 453; Cadwalader *v.* Hartley, 17 Ibid. 520.

[6] Davis *v.* Pawlette, 3 Wisconsin, 300; Carson *v.* Allen, 2 Chandler, 123.

[7] Littlefield *v.* Hodge, 6 Michigan, 326.

[8] Hubbard *v.* Williams, 1 Minnesota, 54.

[9] Commissioners *v.* Fox, Morris, 48; Wilson *v.* Albright, 2 G. Greene, 125.

[10] Gregory *v.* Higgins, 10 California, 339.

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§ 589. Against this strong array of reason and authority in favor of protecting negotiable paper from attachment while it is current, there are some cases, to which we will now direct attention. The Supreme Court of Connecticut considered that no doubt existed that a negotiable note, before it has been negotiated, may be attached on a demand against the payee, but that the attachment was *liable to be defeated by the transfer of the note, at any time before it falls due.*[1] The sum of this is, that the garnishment operates only on the rather slender probability, that a defendant, whose circumstances justify an attachment against him, will hold a negotiable note in his possession until after it becomes due, merely to have its proceeds go to the attaching creditor, whom he might have paid without suit, instead of selling the note and appropriating the proceeds to his private use. Where, however, the note, in form negotiable, has become due, and is still in the hands of the payee, it was held, in the same State, that a garnishment of the maker, in a suit against the payee, would hold the debt as against a subsequent indorsee who received the note with notice of the garnishment.[2]

In Tennessee, it is held, that a negotiable note may be attached; but it is also held, that the liability of a garnishee is conclusively settled by his answer; and if he answers that he does not know where the note is, or who holds it, he does not admit indebtedness to the defendant, and cannot be charged, although at the date of the answer the note may be over due; for it may have been assigned before it fell due. But when the garnishee answers that he was indebted at the time of the garnishment, and it appears that the note *had not been assigned before it was dishonored for non-payment*, he is liable.[3] These views were entertained also in Mississippi.[4]

In Missouri, it has always been held, that negotiable paper may be attached.[5] In the earliest reported case in that State, involving the question, it was decided, that in order to charge the maker of such paper in an action against the payee, the plaintiff must prove

[1] Enos *v.* Tuttle, 3 Conn. 27.

[2] Culver *v.* Parish, 21 Conn. 408.

[3] Huff *v.* Mills, 7 Yerger, 42; Turner *v.* Armstrong, 9 Ibid. 412; Moore *v.* Greene, 4 Humphreys, 299; Daniel *v.* Rawlings, 6 Ibid. 403.

[4] Yarborough *v.* Thompson, 3 Smedes & Marshall, 291; Thompson *v.* Shelby, Ibid. 296.

[5] Scott *v.* Hill, 3 Missouri, 88; St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Ibid. 421; Quarles *v.* Porter, 12 Ibid. 76; Colcord *v.* Daggett, 18 Ibid. 557.

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that, at the time of the garnishment, the defendant was the holder of the note.[1] The court once went so far as to sanction a judgment against the maker of a negotiable note, though he stated in his answer that he had been informed and believed that the note was assigned, for a valuable consideration, before the garnishment;[2] but in another case, subsequently, it was ruled otherwise.[3] The court expressed themselves sensible of the difficulties that exist in holding that debts evidenced by negotiable paper may be attached in the hands of the payer, particularly as the statute prescribes no mode by which an assignee can be brought before the court, and have his rights litigated. "But," say the court, "as the judgment is not conclusive against him, unless he has notice, and chooses to come in and interplead, he would have a right, at any subsequent time, before the money was paid over to the attaching creditor, to arrest the payment, *or, after payment, a right to his action, to recover it back.*"[4] This position, however, was afterwards abandoned.[5]

In Maryland, the courts have gone to greater lengths in sustaining the attachment of negotiable paper than in any other State. It was there held, at an early day, that the garnishment of the maker of a note in a suit against the payee, before the note is passed away by the latter, whether before or after it becomes due, will be sustained.[6] This, of course, involves the total destruction of the negotiability of the note, and constitutes a fit foundation for a subsequent unexampled decision of the Court of Appeals of that State, holding that, where the maker of a negotiable note is, before its maturity, summoned as garnishee of one who then owns the note *as an indorsee*, and judgment is rendered against him, the judgment will protect him against an action on the note, brought by a *subsequent indorsee*, who acquired title to the paper before its maturity, and without any knowledge of the attachment.[7]

[1] Scott *v.* Hill, 3 Missouri, 88.
[2] Quarles *v.* Porter, 12 Missouri, 76.
[3] Walden *v.* Valiant, 15 Missouri, 409.
[4] Quarles *v.* Porter, 12 Missouri, 76; Colcord *v.* Daggett, 18 Ibid. 557.
[5] Funkhouser *v.* How, 24 Missouri, 44; Dickey *v.* Fox, Ibid. 217.
[6] Steuart *v.* West, 1 Harris & Johnson, 536.
[7] Somerville *v.* Brown, 5 Gill, 399. In Kieffer *v.* Ehler, 18 Penn. State, 388, the court use the following language, which is strikingly illustrative of the fundamental error of the Maryland decision: "To hold that an attachment prevents a subsequent *bonâ fide* indorsee for value from acquiring a good title, would be almost a destruction of one of the essential characteristics of negotiable paper. It would be a great injury to persons in embarrassed circumstances holding such paper; for no one could buy it

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§ 590. In concluding this review of the reported decisions in this country on this important subject, it is proper to remark, that in none of the States where the attachment of negotiable paper has been sustained, are the statutory provisions as to the general scope and effect of an attachment, more comprehensive than in those States where the contrary position is taken. In every State the defendant's *credits* may be attached; and that term is, as to this question, fully as comprehensive, as if the statute also authorized — as is frequently the case — the attachment of *rights* or *effects*.

§ 591. It will have been observed that some of the courts whose decisions have been referred to, indicate that an attachment of negotiable paper will prevail against one who acquires title after the attachment, *with notice of it*. If notice is to have this effect, an important question arises as to what will constitute notice. In Pennsylvania, it is considered that the doctrine of implied notice by *lis pendens* is inapplicable to such cases.[1] It can hardly be doubted that the only safe and consistent rule is that the notice must be actual.

§ 592. When one is garnished who holds no relation of debtor to the defendant, except as having, before the garnishment, made a negotiable note to him, he should carefully avoid in his answer any *admission* of indebtedness; for if, in disregard of the rights which may have been already acquired, or which may before the maturity of the note be acquired, by indorsees, he admit a debt, and be charged in respect thereof, his payment as garnishee will be no protection to him against an action on the note, by one who acquires the same, *bonâ fide*, before its maturity; except in Maryland; and there, only until the true principles of law shall have asserted their supremacy over, or wise legislation shall have supplanted, the anomalous and dangerous doctrine there established.[2]

from them with any confidence in the title. Moreover, it would present the strange result, *that the more hands such paper had passed through, and the more indorsers there were on it, the less it would be worth in the money market;* for it would be subject to the more risks of attachment."

[1] Kieffer *v.* Ehler, 18 Penn. State, 388.

[2] Ormond *v.* Moye, 11 Iredell, 564.

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CHAPTER XXIX.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY PRE-EXISTING CONTRACTS WITH THE DEFENDANT, OR THIRD PERSONS.

§ 593. HAVING previously considered[1] the liability of a garnishee, in respect of property of the defendant in his hands, as affected by pre-existing contracts entered into by him, and the principles governing the two cases being similar, it only remains to exhibit here such cases as refer particularly to and illustrate the case of an indebtedness of the garnishee to the defendant.

§ 594. It is an unquestionable doctrine that the garnishment of a person cannot be permitted to interfere with a contract entered into between him and a third person, with reference to his indebtedness to the defendant. Thus, where A. drew a bill of exchange on B. in favor of C., which was indorsed by C. to D., his factor, and then accepted by B., and afterwards B. was garnished in a suit against C.; it was held, that B.'s acceptance was an express contract to pay D., the factor, and that B. could not, therefore, be held as garnishee of C., the principal.[2] So, where A. employed B., at an annual salary of $900, and a short time after the engagement commenced, B. requested that his salary might be paid, as it accrued, to his father, to whom he was indebted, and A., with the approval of the father, agreed so to do; it was held, that A. could not be charged as garnishee of B. The court said: "The statement shows clearly a special agreement between A. and B.'s father, at the instigation of the son, to pay the father the wages due and to become due to the son. Such an agreement, once being made, it was not in the power of the son to revoke it without the father's consent."[3] So, although a father is in law entitled to the earnings of a minor son, he may transfer to the son a right to receive them; and where such a contract is entered into without any fraud, for the advantage of the son, he is

[1] Ante, Ch. XXIII.
[2] Van Staphorst v. Pearce, 4 Mass. 258.
[3] Swisher v. Fitch, 1 Smedes & Marshall, 541; White v. Richardson, 12 New Hamp. 93; Vincent v. Watson, 18 Penn. State, 96.

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entitled to the avails of his labor, and they cannot be attached for his father's debt. And in such case, if the father knows of the son's making a contract for his services on his own account, and makes no objection to it, there is an implied assent that the son shall have his earnings.[1] So, where the defendant was indebted to the garnishees, in the sum of $2,000, and agreed to serve them as bookkeeper for a year, at a salary of $1,500, payable monthly; and that he should receive in money only enough to pay the necessary expenses of his family, and the remainder of his salary was to be applied to the liquidation of his debt; and the garnishees had paid him $500, which was a reasonable sum for his family expenses; it was held, that they could not be charged.[2] So, where the garnishee had become bail for another, on condition that the latter should work for him, and the wages should remain in the garnishee's hands, to indemnify him for his liability; it was held, that the contract could not be interrupted by the garnishment, but should be sustained, and the respective rights of the parties preserved under it.[3] So, where A. was indebted to B., and B. agreed to receive payment thereof in shoemaker's work to be done by a firm in which A. was a partner; and work to the amount of the debt was done by the firm for B.; and thereafter B. was summoned as garnishee of A.; he was held not to be chargeable.[4] So, where a railroad company was summoned as garnishee of one who had contracted to do certain work upon the road, and the contract contained a stipulation which authorized the company, if it saw fit, to see that the laborers employed by the contractor were paid, and to withhold from him an amount of his earnings sufficient for that purpose, and to use it in paying the laborers; it was held, that the garnishment of the company could not have the effect of setting aside this contract, and that the company had the right to hold whatever was due the contractor until the laborers were paid by him, or itself apply the amount to such payment.[5] So, where one agreed to work for a firm, under an understanding, assented to by all the parties, that his wages should be paid by applying the same to the payment of the rent of a house

[1] Whiting *v.* Earle, 3 Pick. 201; Manchester *v.* Smith, 12 Ibid. 113; Bray *v.* Wheeler, 29 Vermont, 514.

[2] Hall *v.* Magee, 27 Alabama, 414.

[3] White *v.* Richardson, 12 New Hamp. 93.

[4] Russell *v.* Convers, 7 New Hamp. 343.

[5] Taylor *v.* Burlington & M. R. R. Co., 5 Iowa, 114.

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occupied by him as a tenant of one of the firm; it was held, that the firm were exonerated from any other mode of payment, and could not be charged as his garnishee on account of wages earned by him.[1]

§ 595. A question arises here, as to the effect of the Statute of Frauds on verbal contracts entered into by the garnishee with third persons, and coming within the terms of the statute, and which he sets up in discharge of his liability to the defendant. In Vermont, it has been decided that such contracts cannot be set up by the garnishee, so as to defeat the recourse of the attaching plaintiff against him.[2] This proceeds upon the erroneous idea, that a verbal contract coming within the terms of the statute is absolutely void; but the better view doubtless is that taken by the Supreme Court of Massachusetts, holding the contract not absolutely void *per se*, but that no action can be maintained on it, if the party sought to be charged plead the statute, and that the privilege of pleading it is a personal one, and may be waived, if the party choose. Therefore, where the defendant kept a boarding-house for the workmen employed in the garnishee's manufactory, and the garnishee became indebted to the defendant for their board; but, when the defendant began to keep the house, it was verbally agreed between the defendant, the garnishee, and several third persons, who subsequently furnished her with provisions and other supplies, that the supplies should be delivered and charged to the defendant, and that at the end of each quarter, the garnishee would see that the persons who furnished them were paid; the court held, that whatever the garnishee was liable for on this guaranty, must go to discharge his debt to the defendant, and that the garnishee, though his undertaking was within the statute, was not bound, against his own choice, to set up that statute in order to avoid his promise.[3]

§ 596. But where a garnishee relies on a contract with a third person, as affecting his liability to the defendant, it must appear that such third person stood in such position as to have a legal right to enter into the contract, and that it was entered into with the defendant's assent; otherwise it will be unavailing. Thus,

[1] Mason *v.* Ambler, 6 Allen, 124.
[2] Hazeltine *v.* Page, 4 Vermont, 49; Strong *v.* Mitchell, 19 Ibid. 644.
[3] Cahill *v.* Bigelow, 18 Pick. 369; Swett *v.* Ordway, 23 Ibid. 266.

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where A. disclosed, as garnishee, that he had executed a note to B., the defendant, which was transferred by B. to C., as collateral security for a debt due to C., and, before the garnishment, A. paid C. a part of the note, and C. thereupon, without B.'s knowledge, released him from any further claim upon it; it was held, that C. had no legal right to discharge A. from liability for the balance, without B.'s assent, and A. was accordingly charged as garnishee in respect thereof.[1]

§ 597. Where the garnishee is indebted, it will not vary his liability, that his contract with the defendant is to pay the money in another State or country than that in which the attachment is pending. Thus, where it was urged as a ground for discharging a garnishee, that his debt to the defendant was contracted in England, and was payable there only, so that the defendant could not, and therefore the plaintiff could not, make it payable elsewhere, the court said: "We do not perceive any legal principle upon which the objection rests. This was a debt from the garnishee everywhere, in whatever country his person or property might be found. A suit might have been maintained by the defendant here, and therefore the debt may be attached here."[2] So, where the debt was contracted where the garnishment took place, but the garnishee agreed to pay the money in another State, he was nevertheless charged; the court referring to the case just cited as sustaining their decision.[3]

[1] Wiggin *v.* Lewis, 19 N. Hamp. 548.
[2] Blake *v.* Williams, 6 Pick. 286.
[3] Sturtevant *v.* Robinson, 18 Pick. 175.

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CHAPTER XXX.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY A FRAUDULENT ATTEMPT BY THE DEFENDANT TO DEFEAT THE PAYMENT OF HIS DEBTS.

§ 598. CASES have arisen, in which a person indebted has sought to prevent his effects from being reached for the payment of his debts, by selling property, and taking promissory notes therefor payable to third persons, in the expectation that such notes could not be reached by garnishment. All such attempts, being in fraud of just creditors, have been entirely discountenanced wherever they have been made, and, if the circumstances permitted, without violating established legal principles, have been defeated.

§ 599. Thus, in Vermont, it appeared from the answer of the garnishee that he had been indebted to the defendant; that the defendant said to him he was afraid his creditors would attach the debt, and desired the garnishee to give notes payable to a third person, which was done, without the concurrence or knowledge of the third person. The court said: "We could not feel justified to allow so obvious a subterfuge to interpose any obstacle in the way of this process. If the person to whom the note is payable is now the *bonâ fide* holder of this note, and received it in the due course of business, while it was still current, the interest thus acquired cannot be defeated by this process, although pending at the time the holder acquired a title to it. But if the holder took the note when overdue, he took it subject to all the defences which existed while the note was in the hands of the defendant. Among such defences may be reckoned attachment by this process."[1] So, in New Hampshire, where A. sold property to B., and unnegotiable notes therefor were executed to C., a resident in another State, who was unknown to B.; and A., at the time of selling the property and taking the notes, said he was owing some debts that he never meant to pay, and some that he

[1] Camp *v.* Clark, 14 Vermont, 387. See Bibb *v.* Smith, 1 Dana, 580; Marsh *v.* Davis, 24 Vermont, 363.

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would pay when he was ready; the court held the transaction fraudulent as to A.'s creditors, and charged B. as his garnishee.[1] So, in Connecticut, where A., with a view to keep his property out of the reach of his creditors, and in pursuance of a combination with B. for that purpose, sold goods belonging to him as the property of B., and took from the vendee a negotiable note, payable to B. at a future day, which B. assigned, before it became due, to C., who was acquainted with the transaction; it was held, that the vendee was the debtor of A., and was therefore liable as his garnishee.[2]

§ 600. In Massachusetts this case arose. A. collected in New York, a sum of money for B., in Boston, and had it, on his return to the latter place, in a thousand-dollar bill. Seeing B., he informed him that he had the money in that shape, and would then have paid B. the amount due him, if the bill could have been changed. As that could not then be done, B. requested A. to give him his negotiable note for the amount due him; in respect of which, by the law of Massachusetts, A. could not be charged as garnishee of B. The note was given, and immediately afterward A. was garnished. Facts in the case tended to show that the note was given for the purpose of preventing the amount collected by A. from being reached by the creditors of B. by garnishment; and it was, therefore, contended that A. was still the debtor of B., and therefore liable; but the court held the note to be a payment *pro tanto*, and that the garnishee was not chargeable.[3]

§ 601. In all cases where one indebted to another gives an obligation to pay the debt to a third person, it may be considered as a sound rule, that, in order to make such obligation effectual to defeat an attachment of the debt as due to the original creditor, it must be shown that the obligation to the third person was *bonâ fide* and upon adequate consideration.[4]

[1] Green *v.* Doughty, 6 New Hamp. 572.
[2] Enos *v.* Tuttle, 3 Conn. 27. See Price *v.* Bradford, 4 Louisiana, 35.
[3] Wood *v.* Bodwell, 12 Pick. 268.
[4] Langley *v.* Berry, 14 New Hamp. 89

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CHAPTER XXXI.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY AN EQUITABLE ASSIGNMENT OF THE DEBT.

§ 602. We have previously seen[1] that an equitable assignment of personal property of a defendant in the hands of a garnishee, will relieve the latter from liability as garnishee on account of such property. We come now to the application of the same principle to a debt due from the garnishee to the defendant. When it is sought to reach by garnishment a credit of the defendant, it must be both legally and equitably due him. Therefore, a debt due to one as a trustee for another, cannot be attached in an action against the trustee, because though legally due him, it is not his property, but another's. Thus, a note having been placed in the hands of an attorney at law for collection, he extended the time of payment, and took a new obligation in his own name. A creditor of the attorney sought to subject the debt secured by this obligation to the payment of a debt due him from the attorney. The evidence showed that the latter did not take the obligation in his own right, or for his own benefit; and it was held, that the attachment could not be sustained.[2] So, where A. undertook to furnish B. certain locks, and did furnish them to a certain amount. Afterwards B. was summoned as garnishee of A., and after the garnishment he received notice that A. was doing business merely as the agent of another: it was held, that B. was not chargeable as garnishee of A.[3]

So, where one was summoned as garnishee of J. S., and answered that he had executed a note to J. S., and given a mortgage to secure its payment; but that he received the consideration thereof from S. H. S., the father of J. S., and always paid the interest thereon to him; and that he had never known J. S., or transacted any business with him; and it appeared in evidence that the note was, at the death of S. H. S., found by his executors

[1] Ante, Ch. XXIV.
[2] Rodgers v. Hendsley, 2 Louisiana, 597.
[3] Kaley v. Abbot, 14 New Hamp. 359.

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among his papers, and was scheduled by S. H. S. as a part of his assets; and that S. H. S. was in the habit of lending money on notes and mortgages, taking the securities in the names of his different relatives; that he never surrendered his right to them when he retained possession of the papers, but considered them as his own property, and such was the case with the note in question; that the note never was in the possession of J. S., nor did he ever make any claim to it; but, on the contrary, S. H. S., when it was given, told the maker that he would always find it in his possession: it was held, that the note did not belong to J. S., and that, therefore, the garnishee could not be charged.[1]

The same principle is applicable to all cases of equitable assignments of debts; where the defendant may be legally entitled to collect the debt, but not for his own benefit.

§ 603. The doctrine which establishes the assignability in equity of *choses in action*, arises from the public utility of increasing the quantity of transferable property, in aid of commerce and of private credit.[2] It is a well-known rule of the common law, that no possibility, right, title, or thing in action, can be granted to third persons. Hence, a debt, or other *chose in action*, could not be transferred by assignment, except in case of the king; to whom and by whom at the common law an assignment of a *chose in action* could always be made; for the policy of the rule was not supposed to apply to the king. So strictly was this doctrine construed, that it was even doubted whether an annuity was assignable, although assigns were mentioned in the deed creating it. And at law, with the exception of negotiable instruments and some few other securities, this still continues to be the general rule, unless the debtor assents to the transfer; but if he does assent, then the right of the assignee is complete at law, so that he may maintain a direct action against the debtor, upon the implied promise to pay him the same, which results from such assent. But courts of equity have long since totally disregarded this nicety. They accordingly give effect to assignments of *choses in action*. Every such assignment is considered in equity as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to make use of the name of

[1] Leland *v.* Sabin, 7 Foster, 74.

[2] Dix *v.* Cobb, 4 Mass. 508.

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the assignor, in order to recover the debt, or to reduce the property into possession.[1]

§ 604. Hence where it appears that a debt due from the garnishee to the defendant had been equitably assigned before the garnishment, the court will take cognizance of the assignment and protect the rights of the assignee. For, as the defendant has parted with his interest in the debt, and can no longer maintain an action for it against the garnishee, for his own benefit; and as the plaintiff can acquire no greater interest in the debt than the defendant had at the time of the garnishment; it results that the garnishee cannot be charged for that which, equitably, he has ceased to owe to the defendant, and owes to another person.

The extent to which courts will protect the rights of parties under equitable assignments, is illustrated by the following case: A. made a contract with B. in relation to some wool, the effect of which was, that A. still retained an interest in the same, during the process of manufacturing it. B. agreed to effect an insurance on the wool for the benefit of A., and procured a policy in his own name in pursuance of that agreement, and for that object. After the making of the policy, and before a loss under it, B. informed A. that he had effected an insurance for A.'s benefit, pursuant to the previous stipulation. Afterward the wool was destroyed by fire, and the insurance company was summoned as garnishee of B.; and A. became a party to the suit claiming the insurance money, under his arrangement with B. It was held, that A. had an equitable interest in the policy, equivalent to that of an assignee of a *chose in action*, and sufficient to enable him to hold the avails of the same as against the attaching creditor.[2]

§ 605. As a general rule, personal property has, in contemplation of law, no locality or *situs*, but is deemed to follow the person of the owner. Hence it results, that a voluntary transfer or alienation is governed by the law of the place of his domicile. It is also

[1] 2 Story's Equity, § 1039, 1040.

[2] Providence County Bank *v.* Benson, 24 Pick. 204. See Green *v.* Gillett, 5 Day, 485; Lamkin *v.* Phillips, 9 Porter, 98; Hodson *v.* McConnell, 12 Illinois, 170; Galena & Chicago U. R. R. Co. *v.* Menzies, 26 Ibid. 121; Carr *v.* Waugh, 28 Ibid. 418; Whitten *v.* Little, Georgia Decisions, Part II. 99; Forepaugh *v.* Appold, 17 B. Monroe, 625; Patten *v.* Wilson, 34 Penn. State, 299.

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a general principle, sanctioned and acted on in all civilized countries, that the laws of one country will, by what is termed the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. Therefore the law of the place where a personal contract is made, is to govern in deciding upon its validity or invalidity; and a conveyance of personal property which is valid by that law, is equally effectual elsewhere. These principles apply to debts and other *choses in action*, as well as to any other species of personal property. While the rule that the law of one nation will be carried into effect in the territories of another, is subject to some exceptions, yet as a general rule it is established, and has an application to the subject now under discussion, in connection with an assignment of a debt in one State, in such a manner as to be effectual by the laws of that State, but which is wanting in some particular to make it so in another State, where the debtor resides. In such case the assignment will be sustained as against an attaching creditor, residing in the State where the assignment was made;[1] and also against one residing in the State where the debt, or *chose in action*, is.[2]

§ 606. In order, however, that the rights of the assignee should be fully protected, it is important that he immediately notify the debtor of the assignment. Though the assignment, as between the parties to it, is complete and effectual from the moment it is made, and the assignor, if he afterward receive payment of the debt, will be obliged to pay the amount to the assignee, yet the debtor is under no obligation to pay the assignee until he receive notice of the assignment. After that, a payment to the assignor will be at the debtor's peril.

§ 607. Hence, if a debtor be summoned as garnishee of his creditor, and have received no notice of an assignment of his debt, a judgment rendered against him will protect him from subsequent liability to an assignee.[3] If he have received information of an assignment, it is his duty, in answering, to state that fact,

[1] Van Buskirk *v.* Hartford Fire Ins. Co., 14 Conn. 583; Burlock *v.* Taylor, 16 Pick. 335; Whipple *v.* Thayer, Ibid. 25; Daniels *v.* Willard, Ibid. 36; Martin *v.* Potter, 11 Gray, 37; Noble *v.* Smith, 6 Rhode Island, 446; Russell *v.* Tunno, 11 Richardson, 303.

[2] Houston *v.* Nowland, 7 Gill & Johnson, 480; Wilson *v.* Carson, 12 Maryland, 54; Mowrey *v.* Crocker, 6 Wisconsin, 326.

[3] Tudor *v.* Perkins, 3 Day, 364; Richards *v.* Griggs, 16 Missouri, 416; Clodfelter *v.* Cox, 1 Sneed, 330; McCoid *v.* Beatty, 12 Iowa, 299; Dodd *v.* Brott, 1 Minnesota, 270.

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so as to guard the rights of the assignee; but more especially his own: for if he fail to do so, and judgment go against him as a debtor of the assignor, it will afford him no protection against a suit by, and a second payment to, the assignee.[1] The particular shape in which this information may have been received is of no consequence, provided it be shown to have been derived from the assignee or his agent.[2] And it is no part of the garnishee's duty (except, perhaps, in those New England States where facts stated in the garnishee's answer are regarded, only so far as he may declare his belief of their truth) to ascertain the truth or falsity of the information, before he determines whether he will state it in his answer. True or false, it should be stated in every case, whether the answer is in itself conclusive, or may be controverted and disproved. For if the answer be conclusive, and the garnishee fails to state the information he has received, because he may not believe it to be true, he assumes all the responsibility of the correctness of his belief, not only as to the facts within his knowledge, but as to other facts, of the existence of which he may be ignorant, and which might show his information to be true. And if the answer be not in itself conclusive, but may be controverted and disproved, he should not prejudge the case, and decide that the information is untrue; but should leave the plaintiff to deny, and the court to adjudicate its truth.[3]

§ 608. An assignment of a debt will protect the rights of the assignee from a subsequent attachment against the assignor though no notice may have been given to the debtor before the attachment, if it be given in time to enable him to take advantage of it before judgment against him as garnishee.[4] And it is his

[1] Nugent *v.* Opdyke, 9 Robinson (La.), 453; Crayton *v.* Clark, 11 Alabama, 787; Foster *v.* White, 9 Porter, 221; Colvin *v.* Rich, 3 Ibid. 175; Lamkin *v.* Phillips, 9 Ibid. 98; Pitts *v.* Mower, 18 Maine, 361; Bunker *v.* Gilmore, 40 Ibid. 88; Walters *v.* Washington Ins. Co., 1 Iowa, 404; Prescott *v.* Hull, 17 Johns. 284; Kimbrough *v.* Davis, 34 Alabama, 583; Page *v.* Thompson, 43 New Hamp. 373.

[2] Bank of St. Mary *v.* Morton, 12 Robinson (La.), 409.

[3] Foster *v.* Walker, 2 Alabama, 177; Wicks *v.* Branch Bank, 12 Ibid. 594.

[4] Dix *v.* Cobb, 4 Mass. 508; Stevens *v.* Stevens, 1 Ashmead, 190; Pellman *v.* Hart, 1 Penn. State, 263; Crayton *v.* Clark, 11 Alabama, 787; Smith *v.* Sterritt, 24 Missouri, 260; Walters *v.* Washington Ins. Co., 1 Iowa, 404; Muir *v.* Schenck, 3 Hill (N. Y.), 228. That the doctrine stated in the text is correct, cannot, I think, be reasonably doubted; but in Connecticut and Vermont, it is held, that an attachment of a debt, made before notice of its assignment, will prevail against the assignment, though notice be given to the debtor before judgment against him as garnishee. Judah *v.* Judd, 5

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duty, at any time before such judgment, to make such notice known to the court; failing in which, the judgment will avail him nothing as a defence against an action by an assignee of the debt.[1]

§ 609. An assignment of a debt is usually made in writing, but this formality is not necessary where the debt is evidenced by a writing; a delivery of which to the assignee, for a valuable consideration, will operate an assignment, so far as to enable him to maintain an action upon it in the name of the assignor.[2] Wherever, therefore, a writing given by a garnishee to the defendant, has been *bonâ fide* transferred by delivery to a third person, the garnishee cannot be charged. Thus, where the evidence of the garnishee's indebtedness consisted of a certificate of a certain amount of lumber cut for him by the defendant, with a statement of what was to be paid for it, attested by third persons, and before the garnishment this certificate was assigned by delivery; the court held the assignment good, and discharged the garnishee.[3] So where a lessor delivered to his creditor a lease, on which rent was due, to enable him to receive the same in part payment of the lessor's debt to him, and the lessee knew of the delivery for that purpose, and agreed to account to the creditor for the rent due; it was held a good equitable assignment of the rent as against an attaching creditor of the lessor.[4]

§ 610. It is, however, impracticable thus to transfer by delivery a book account or other debt, not evidenced by writing. As a symbolical delivery of personal property, so situated that an actual delivery of it could not be made, has been regarded as sufficient so the assignee of a judgment, or of a book debt, may, upon the same principle, be enabled to establish his rights without proof of an actual delivery. For a delivery of a transcript of them would not prove a delivery of the debt or judgment. It would only prove the delivery of something indicative of their existence and of the intention of the parties. Other evidence, showing that the transfer had been completed, would be sufficient.[5] In all such cases the

Day, 534; Bishop *v.* Holcombe, 10 Conn. 444; Van Buskirk *v.* Hartford F. I. Co., 14 Ibid. 141; Ward *v.* Morrison, 25 Vermont, 593.

[1] Crayton *v.* Clark, 11 Alabama, 787.

[2] King *v.* Murphy, 1 Stewart, 228; Bayley on Bills, 2d Am. Ed. 102.

[3] Littlefield *v.* Smith, 17 Maine, 327; Hardy *v.* Colby, 42 Ibid. 381; Byars *v.* Griffin, 31 Mississippi, 603.

[4] Dennis *v.* Twichell, 10 Metcalf, 180.

[5] Porter *v.* Bullard, 26 Maine, 448.

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assignment should, for greater certainty, be written; though, as we shall presently see,[1] a verbal assignment, if assented to by the debtor, will suffice.

An assignment of a *chose in action*, or of a fund, need not be by any particular form of words, or particular form of instrument. Any binding appropriation of it to a particular use, by any writing whatever, is an assignment, or what is the same, a transfer of the ownership. Thus, a power of attorney to collect moneys and pay them over to certain named parties, was held, as soon as the moneys were collected, to be in effect an assignment.[2] So, a power of attorney, irrevocable, authorizing the attorney to collect a sum of money, to his own use, is a constructive assignment of the money to him.[3] So, a power of attorney to receive all the money due from A. to the constituent, and to give a discharge therefor in the constituent's name, with a clause stating that this "is an assignment of the same," constitutes an assignment of the debt to the attorney, though the power is not in terms irrevocable, and does not expressly authorize the attorney to receive the money to his own use.[4] So, where a garnishee disclosed indebtedness to the defendant, but stated that the defendant had drawn an order on him to pay the balance of his account to a third person; and it was objected that this was no assignment, because it did not purport to be for value received, and because it did not appear but that the drawee named in the order was the servant of the defendant, to receive the money for the defendant's use; it was held, that there was a *primâ facie* assignment, and that the words *value received* were not necessary.[5] So, where A. was indebted to B. on a book account, and B. drew out a bill of the items, and wrote at the bottom a request to A. to pay the amount to C.; and notice of the assignment was given to A.; and afterwards A. was garnished in a suit against B., and was charged as garnishee and paid the money; and suit was then brought in B.'s name, for the use of C., to recover the money; it was held, that the order, being drawn for the whole amount due, was an assignment of the debt, and that A. was bound to know that an assignment was intended.[6]

[1] Post, § 614.
[2] Watson *v.* Bagaley, 12 Penn. State, 164.
[3] Gerrish *v.* Sweetser, 4 Pick. 374.
[4] Weed *v.* Jewett, 2 Metcalf, 608. See People *v.* Tioga C. P., 19 Wendell, 73.
[5] Adams *v.* Robinson, 1 Pick. 461. See Johnson *v.* Thayer, 17 Maine, 401.
[6] Robbins *v.* Bacon, 3 Maine, 346.

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§ 611. It is not, however, every order which may be drawn on a party having moneys of, or indebted to, the drawer, which will operate an assignment of the money or debt. A bill of exchange, for instance, is not an assignment of the fund on which it is drawn, or any part thereof, until accepted by the drawee.[1] If, however, an order be drawn for the *whole* of a *designated fund* in the hands of the drawee, it is an assignment, whether accepted by the latter or not;[2] but it is well settled that where an order is drawn on either a general or particular fund, *for a part only*, it does not amount to an assignment of that part, unless the drawee consent to the appropriation by an acceptance of the draft; or an obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties, as a part of their contract.[3] Therefore, where A., under an attachment against B., summoned a bank as garnishee, which, at the time, had money of B. on deposit, and after the garnishment, A., B., and the cashier of the bank being together at a place distant from the bank, B. drew a check on the bank for a certain sum, and delivered it to A., in payment of his debt to A., and A. receipted for it and signed an order to dismiss his attachment upon the amount of the check being transferred to his credit on the books of the bank, and delivered the check to the cashier for the purpose of having the transfer made when he should return to the bank; and, before his return, other creditors of B. had garnished the bank; but, notwithstanding, the cashier charged the check to B.'s account and carried the same amount to the credit of A.; it was held, that the check was no assignment of any part of B.'s money in the bank until it was presented and paid, and that the subsequent attachers were entitled to the money, notwithstanding the entries made on the books of the bank.[4]

§ 612. It is not necessary that the debt assigned should be due at the time of the assignment, in order to protect the rights of

[1] Mandeville *v.* Welch, 5 Wheaton, 277; Cowperthwaite *v.* Sheffield, 1 Sandford, Sup. Ct. 416; s. c. 3 Comstock, 243; Sands *v.* Matthews, 27 Alabama, 399; Luff *v.* Pope, 5 Hill (N. Y.), 413; s. c. 7 Ibid. 577; Winter *v.* Drury, 1 Selden, 525; Kimball *v.* Donald, 20 Missouri, 577; Wilson *v.* Carson, 12 Maryland, 54.

[2] McMenomy *v.* Ferrers, 3 Johns. 71; Miller *v.* Hubbard, 4 Cranch, C. C. 451; Macomber *v.* Doane, 2 Allen, 541.

[3] Poydras *v.* Delaware, 13 Louisiana, 98; Mandeville *v.* Welch, 5 Wheaton, 277; Cowperthwaite *v.* Sheffield, 1 Sandford, Sup. Ct. 416; s. c. 3 Comstock, 243; Gibson *v.* Cooke, 20 Pick. 15; Tripp *v.* Brownell, 12 Cushing, 376.

[4] Bullard *v* Randall, 1 Gray, 605.

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the assignee from an attachment against the assignor. A debt afterwards to accrue may be effectually assigned. Thus, where A. was employed as a laborer by B., and, being indebted to C., executed a power of attorney authorizing C. to receive and receipt for all sums of money then due or thereafter to become due to him, and stating that the power was an assignment of the money; and B. agreed to pay A.'s wages to C.; it was decided that the assignment was valid, and that B. could not be held as garnishee of A.[1] So, where A. was employed as an assessor of the city of Mobile, and before the service required of him in that capacity had been performed, he drew an order on the corporation in favor of B. for the agreed compensation for his services, which was accepted by the mayor of the city; it was decided that the assignment of the debt was complete, and that the corporation could not be held as garnishee of A.[2]

§ 613. But while it is true that a debt to become afterwards due may be assigned, it is necessary that, at the date of the assignment, the contract out of which the debt is to grow should have some existence. A mere possibility of future indebtedness, without any subsisting engagement upon which it shall accrue, cannot be assigned. The debt may be conditional, uncertain as to amount, or contingent; but to be the subject of an assignment, there must be an actual or possible debt, due or to become due. Therefore where A. executed a paper in July, purporting to transfer to B. "all claims and demands which A. now has or which he may have against C., on the first day of January next, for all sums of money due and to become due to A. for services in laying common sewers"; with a power of attorney irrevocable to receive the same; and it was altogether uncertain whether C. would afterwards employ A. at all, and the existence of any debt from him to A. after the date of the assignment depended wholly on A.'s being so employed; it was decided, that the transfer to B., as against a subsequent attaching creditor, carried only what was due at its date, and did not reach anything becoming due to A. afterwards, from subsequent employment.[3]

[1] Weed *v.* Jewett, 2 Metcalf, 608; Emery *v.* Lawrence, 8 Cushing, 151; Hartley *v.* Tapley, 2 Gray, 565; Taylor *v.* Lynch, 5 Ibid. 49; Lannan *v.* Smith, 7 Ibid. 150. See Cahill *v.* Bigelow, 18 Pick. 369; Van Staphorst *v.* Pearce, 4 Mass. 258.

[2] Payne *v.* Mobile, 4 Alabama, 333. See Tucker *v.* Marsteller, 1 Cranch, C. C. 254

[3] Mulhall *v.* Quinn, 1 Gray, 105.

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§ 614. When a debt is not evidenced by a writing, it may be assigned verbally, if the debtor assent. Where such assent is given, the assignment is complete, and the debtor is bound to pay to the assignee, and consequently cannot be charged as garnishee of the assignor. Thus where the answer of a garnishee admitted that he had been indebted to the defendant, but stated that before he was garnished there was a verbal agreement between him and the defendant and a creditor of the defendant, that the debt should be paid to the creditor; the answer was held to be evidence in the garnishee's favor to show that he was not indebted to the defendant. This was in effect giving to the arrangement the character and force of an equitable assignment of the debt; otherwise the answer was inadmissible as evidence to the purport stated.[1] So, where A. & B. were partners, and upon a dissolution of the firm, A. was found indebted to B., and B. requested him to pay the amount to C., his creditor, who was present, and A. replied that it was immaterial to him to whom he paid the money; it was held to be a transfer of the debt, so as to prevent A. from being charged as garnishee of B.[2] So, if by agreement between both the partners and a debtor of the firm, the debt of the latter is to be paid to one of the partners after a dissolution of the firm, the debtor may be held as garnishee of him to whom it is so to be paid.[3]

§ 615. In any case of the transfer of evidences of debt, where the assignee undertakes to assert title through such transfer, the good faith of the transaction may, of course, be the subject of inquiry, and must be shown, if sufficient evidence be presented to cast suspicion upon it. The assignee will, in such case, be entitled, in the first instance, to the benefit of all presumptions in his favor, but those presumptions may be overthrown by proof, as in any other transaction. If the assignment be direct from the debtor to him, and made without consideration or with a fraudulent intent, known to the assignee, he cannot avail himself of it to defeat an attachment. And the infirmity of the transaction will affect the title of a subsequent purchaser, having knowledge of the fraudulent character of the original assignment. But no such result will

[1] Black *v.* Paul, 10 Missouri, 103; Porter *v.* Bullard, 26 Maine, 448; Curle *v.* St. Louis Perpetual Ins. Co., 12 Missouri, 578; Rudd *v.* Paine, 2 Cranch, C. C. 9; Newby *v.* Hill, 2 Metcalfe (Ky.), 530; Noyes *v.* Brown, 33 Vermont, 431; Hutchins *v.* Watts, 35 Ibid. 360.

[2] Lovely *v.* Caldwell, 4 Alabama, 684. [3] Marlin *v.* Kirksey, 23 Georgia, 164.

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ensue, where the subsequent purchaser has not such knowledge. He may know that the debtor transferred the paper without consideration, but that will not prevent his acquiring, for value, a complete title; for such transfer is not necessarily fraudulent *per se;* and the purchaser is not bound to inquire into the solvency of the assignor, or into the circumstances which might give a fraudulent aspect to the transaction. Thus, where A., who was insolvent, transferred to B., as a gift, a check on a bank, and B., for value, sold the check to C., who knew that B.'s title was that of a donee, without consideration, but had no knowledge that the gift was in fraud of A.'s creditors; it was held, that C.'s title was valid and effectual against an attachment, under which the drawer of the check was summoned as garnishee of A.[1]

§ 615 *a*. All the views expressed in this chapter will have been seen to refer to cases of assignments of debts made *before* the garnishment of the debtor. No assignment made after that event can have any effect to deprive the attachment plaintiff of his recourse against the garnishee.[2]

[1] Fulweiler *v.* Hughes, 17 Penn. State, 440. From the opinion of the court, we present the following extract: "From all other property commercial paper is distinguished by the fact that it carries on its face all the evidences of title which persons dealing in it are charged with notice of. Hence a party may, with perfect safety, purchase a negotiable instrument, if it is all fair upon its face, unless he has actual notice of a defect in the holder's title, or it is offered under suspicious circumstances. Hence, also, notice that the instrument is a mere accommodation or gift, does not prevent a purchaser for value from taking a good title; for the giving of the paper is a declaration of intention that it may be put into free circulation for the benefit of the payee; and therefore one may, with a good conscience, buy it and claim upon it, even though he knows its character. A contrary doctrine would involve the duty on the part of the accommodation payee to inform the purchaser of the character of the instrument, and this would then defeat the very object for which it was given.

"From these remarks it is apparent that a donee of negotiable paper does not stand upon the same rule as a purchaser from the donee with knowledge of the gift; for the latter may recover, though the former could not have done so. Notice that it is a gift is not notice that payment is not intended, and one may purchase *bonâ fide* under the former notice, when he could not under the latter. The donee has a good title, though a revocable one, and he can pass a good title to any one not notified of the revocation.

"These principles are plain, and rule the question under consideration. The check was a gift to B., and by the gift he acquired a good title as against the donor, but revocable by the donor's creditors. The purchaser knew of the gift, but he did not know of the revocation, or of the facts which amounted to a revocation, for he knew nothing of the donor's insolvency, and the donee was also ignorant of it. One could sell and the other could purchase the check in good faith; and the subsequent notice of insolvency and reclamation by the creditors, does not affect the purchaser's conscience, or make it *mala fides* in him to hold on to what he has honestly and innocently purchased."

[2] Stevens *v.* Pugh, 12 Iowa, 430.

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CHAPTER XXXII.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY THE COMMENCEMENT, PENDENCY, AND COMPLETION OF LEGAL PROCEEDINGS AGAINST HIM, BY THE DEFENDANT, FOR THE RECOVERY OF THE DEBT.

§ 616. It frequently happens that when a garnishee is summoned, a suit is pending against him on the part of the defendant, or that the defendant has obtained a judgment against him for the debt in respect of which he is garnished. Numerous cases of this description have received adjudication, and the decisions are by no means consentaneous. We will consider, I. the effect of the pendency of a suit by the defendant against the garnishee; and, II. the question whether a judgment debtor can be held as garnishee of the judgment plaintiff.

§ 617. I. *The Effect of the Pendency of a Suit by the Defendant against the Garnishee.* It is an invariable and indispensable principle, that a garnishee shall not be made to pay his debt twice. Consequently when he is in such a situation that, if charged as garnishee, he cannot defend himself against a second payment to his creditor, he should not be charged. This principle has been applied, as we shall presently see, to cases where legal proceedings were pending against the garnishee on behalf of the defendant.

§ 618. A case is reported as having been decided in Massachusetts, in 1780, taking the broad ground that a garnishee cannot be charged on account of a debt, for the recovery of which an action, previously commenced by the defendant, is pending at the time of the garnishment. This was under the old provincial trustee act of 32 Geo. 2;[1] but it was overruled in 1828, under the then existing statute.[2] In New Hampshire, likewise, the same ground was at one time assumed,[3] but afterwards abandoned.[4]

§ 619. There came before the Supreme Court of the United States, a case which might seem to favor the view first entertained

[1] Gridley *v.* Harraden, 14 Mass. 496.
[2] Thorndike *v.* DeWolf, 6 Pick. 120.
[3] Burnham *v.* Folsom, 5 New Hamp. 566.
[4] Foster *v.* Dudley, 10 Foster, 463.

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in Massachusetts and New Hampshire, but it is essentially different. A. sued B. in the District Court of the United States for Alabama. After the action was brought, B. was summoned as garnishee of A., in a county court of Alabama, and judgment was there rendered against him. He then pleaded the judgment in bar of the action pending in the United States Court, and the court, on demurrer, held the plea bad. The Supreme Court on this point say: "The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts, that would extremely embarrass the administration of justice."

The court, however, expressly recognize the doctrine that if the garnishment had taken place before the action was brought, it would have been sufficient in abatement, or bar, as the case might be. They say: "If the attachment had been conducted to a conclusion, and the money recovered of the defendant before the commencement of the present suit, there can be no doubt that it might have been set up as a payment upon the note in question. And if the defendant would have been protected *pro tanto*, under a recovery had by virtue of the attachment, and could have pleaded such recovery, in bar, the same principle would support a plea in abatement, of an attachment pending prior to the commencement of the present suit. The attachment of the debt, in such case, in the hands of the defendant, would fix it there in favor of the attaching creditor, and the defendant could not afterwards pay it over to the plaintiff. The attaching creditor would, in such case, acquire a lien upon the debt, binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, could not fail to regard. If this doctrine be well founded, the priority of suit will determine the right. The rule must be reciprocal; and where the suit in one court is commenced prior to the proceedings under attachment in another court, such proceedings cannot arrest the suit; and the maxim *qui prior est tempore, potior est jure*, must govern the case."[1]

The difference between this case and those first decided in New

[1] Wallace *v.* M'Connel, 13 Peters, 136. See Bingham *v.* Smith, 5 Alabama, 651, Greenwood *v.* Rector, Hempstead, 708; Wood *v.* Lake, 13 Wisconsin, 84.

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Hampshire and Massachusetts, lies in the two proceedings in Alabama taking place in different jurisdictions; and the whole decision of the Supreme Court of the United States was based on the conflict of jurisdiction, which would grow out of a practice such as that passed upon by that tribunal.

§ 620. In Massachusetts, the liability of a garnishee where an action on behalf of the defendant is pending against him, turns upon the state of the pleadings in the action at the time of the garnishment. If the pleadings are in such state that the garnishee can plead the garnishment in bar of the action, he can be charged; otherwise not.[1] Hence, in the first reported case of the kind in that State, where the garnishee had been sued by the defendant, and, before the garnishment, the action had been referred by rule of court, in which rule it was agreed that judgment should be entered up according to the report of the referees, and execution issued thereon; it was determined that the garnishee could not be charged, because in this state of the action no day for pleading remained for the garnishee, and the law furnished him no defence against the defendant's demand of judgment.[2] The same rule was enforced in a case of similar facts, where the garnishment took place after the award of the referees, but before judgment rendered thereon.[3]

In another case, where, after issue joined, the defendant was summoned as garnishee of the plaintiff, and after verdict for the plaintiff, the defendant moved in arrest of judgment, on the ground of the garnishment, the same court held, that the motion could not prevail, and that the garnishment was void, because made after issue joined, when the garnishee could not defend himself against a recovery in the action, by the trial of any issue in fact or in law, on any plea which he had opportunity to plead.[4]

Where, however, the defendant in a pending action was garnished, and, before the action was brought to a judgment, he was charged as garnishee, and paid the amount recovered against him as such, it was held to be a good bar to the action.[5]

And where the garnishee is, at the time of the garnishment, indebted to the defendant, a payment by him of a judgment sub-

[1] Thorndike *v.* DeWolf, 6 Pick. 120.
[2] Howell *v.* Freeman, 3 Mass. 121.
[3] M'Caffrey *v.* Moore, 18 Pick. 492.
[4] Kidd *v.* Shepherd, 4 Mass. 238.
[5] Foster *v.* Jones, 15 Mass. 185.

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sequently recovered, will not discharge him. Thus, where A. was summoned as garnishee of B., pending a suit against him by B., and it was agreed between A. and the plaintiff in attachment, that the garnishment proceedings should be continued until the suit of B. against A. should be determined; and B. afterward obtained judgment against A., who appealed therefrom, and gave bond to abide the decision of the appellate court; and A. then answered as garnishee, denying that he was liable on the contract on which B. had obtained a judgment, and referring to his appeal from the judgment; and, at a subsequent time further answered, that he had settled the appeal, by paying the amount of the judgment appealed from; it was held, that A. was liable as garnishee of B. The court fully recognized the principles they had previously laid down, in regard to summoning a person as garnishee pending an action against him; but held, that the garnishee, by his mistake of the nature of his defence against B.'s demand, or by his inattention, had placed himself beyond the protection of those principles.[1]

In Maine, the mere fact of issue being joined, is considered to have no effect in exempting the garnishee from liability.[2]

In Vermont and New Hampshire, on the other hand, the courts seem disposed to adopt the Massachusetts rule, so far as to discharge the garnishee, where the condition of the action against him is such that he cannot plead the garnishment in bar thereof.[3] Hence, where the garnishee disclosed that the defendant had commenced a suit in chancery against him, which, before the garnishment, had been set down for trial, and between the time of the garnishment and that of filing the garnishee's answer, had been heard by the chancellor, and continued for his decision; the court decided that the garnishee could not be charged, because the proceedings in the chancery court could not be arrested, or its decree anticipated, and the garnishee, if charged, might be compelled to pay the demand a second time.[4]

[1] Locke *v.* Tippets, 7 Mass. 149.

[2] Smith *v.* Barker, 10 Maine, 458.

[3] Trombly *v.* Clark, 13 Vermont, 118; Foster *v.* Dudley, 10 Foster, 463.

[4] Wadsworth *v.* Clark, 14 Vermont, 139. In Spicer *v.* Spicer, 23 Vermont, 678, it was held, that when a defendant, in a suit pending, is summoned as garnishee of the plaintiff, and is charged for the full amount of the plaintiff's claim against him, and the judgment charging him remains unsatisfied; judgment should be rendered for the plaintiff for the amount of his claim, but that the court will order execution stayed, until the plaintiff shall cause the defendant to be released from the garnishment.

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In Pennsylvania, the pendency of an action by the defendant against the garnishee, at the time of the garnishment, will not prevent the garnishee's liability. The court there, acting upon probably the first case in this country in which this question was involved, reject the English doctrine, that a debt in suit cannot be attached, as inapplicable to the state of things here. The doctrine in England grows out of the fact that garnishment there is the offspring of special and local custom, and takes place in inferior courts; and the courts of general jurisdiction will not permit suits depending before them to be affected by the process of inferior tribunals exercising a jurisdiction of the kind belonging to the courts of the sheriff and lord mayor of London.[1] In Tennessee, the same view is taken as in Pennsylvania;[2] and so in Alabama, where the suit and the garnishment are in the same court;[3] but not where they are in different courts; at least when the debt is controverted.[4]

§ 621. We may state, then, as the result of these decisions, 1. That the pendency, in the same court, of an action on behalf of the defendant against the garnishee, will not preclude the garnishee's being charged; 2. That where the action is pending in one court and the garnishment in another, and the courts are of different jurisdictions, that which was first instituted will be sustained; and, 3. That when the action is in such a situation that the garnishee, if charged, cannot avail himself of the judgment in attachment as a bar to a recovery in the action, he cannot be held as garnishee.

§ 622. II. *Can a Judgment Debtor be held as Garnishee of the Judgment Creditor?* On this point the authorities differ. Where, as in New Hampshire, a person against whom suit has been brought cannot be charged as garnishee; and where, as in Massachusetts and Vermont, the garnishee in such case cannot be made liable, if the pending action be in such situation that the garnishment cannot be pleaded therein; and where the judgment is in one court and the garnishment in another; it might be expected

[1] M'Carty *v.* Emlen, 2 Dallas, 277; s. c. 2 Yeates, 190; Crabb *v.* Jones, 2 Miles, 130; Sweeny *v.* Allen, 1 Penn. State, 380.
[2] Huff *v.* Mills, 7 Yerger, 42.
[3] Hitt *v.* Lacy, 3 Alabama, 104.
[4] Bingham *v.* Smith, 5 Alabama, 651.

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to be decided that the judgment debtor could not be charged as garnishee of the judgment creditor.

In New Hampshire and Vermont, the question has not directly come up, though in the latter State the court, on one occasion, used language which might be construed to authorize the garnishment of a judgment debtor. They say: "The statute makes all the goods, chattels, rights, or credits of the defendant in the hands of the trustee liable for the debts of the defendant. Hence, if the trustee is indebted to the defendant, he is liable to be summoned as trustee without regard to the nature of the indebtedness, whether by record, specialty, or simple contract. No exception is made whether a suit is depending in favor of the defendant, or whether payable or not."[1]

In Massachusetts, it was held, that one against whom an execution on a judgment was in the hands of a sheriff, could not be held as garnishee of the plaintiff therein;[2] and that a judgment debtor, against whom an execution might issue, could not be so charged.[3] Justice STORY, in a case which came before the Circuit Court of the United States in Rhode Island, held the same ground;[4] as did the Supreme Court of New Jersey,[5] and that of Arkansas.[6] And in Tennessee, it was decided that a judgment debtor in a court of record, could not be subjected to garnishment in a proceeding before a justice of the peace.[7]

§ 623. On the other side we find the courts of Connecticut, Pennsylvania, Delaware, Alabama, Mississippi, Indiana, and Illinois. In the first-named State, the court thus announced its views: "By the custom of London, from which our foreign attachment system was principally derived, it is said, that a judgment debt cannot be attached; and the same has been holden by the courts in Massachusetts. A fair, and, as we think, very obvious construction of our statute on this subject, as well as the general policy of our attachment laws, leads us to a different conclusion. It is enacted that 'where debts are due from *any person* to an absent and absconding debtor, it shall be lawful for any

[1] Trombly v. Clark, 13 Vermont, 118.
[2] Sharp v. Clark, 2 Mass. 91.
[3] Prescott v. Parker, 4 Mass. 170.
[4] Franklin v. Ward, 3 Mason, 136.
[5] Shinn v. Zimmerman, 3 Zabriskie, 150.
[6] Trowbridge v. Means, 5 Arkansas, 135; Tunstall v. Means, Ibid. 700.
[7] Clodfelter v. Cox, 1 Sneed, 330.

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creditor to bring his action against such absent and absconding debtor,' &c.; and that '*any debt* due from such debtor to the defendant shall be secured to pay such judgment as the plaintiff shall recover.' The provisions of this statute were extended, in 1830, to the attachment of debts due to such persons as should be discharged from imprisonment. The language of this statute clearly embraces judgment debts as well as others; and the reason and equity of it are equally extensive. A judgment debt is liquidated and certain; and, in ordinary cases, little opportunity or necessity remains for controversy respecting its existence, character, or amount. The policy of our laws has ever required, that all the property of a debtor not exempted by law from execution, should be subject to the demands of his creditors; and that every facility, consistent with the reasonable immunities of debtors, should be afforded to subject such property to legal process.

"It is true, as has been contended, that to subject judgment debts to attachment, and especially those upon which executions have issued, may, in some cases, produce inconvenience and embarrassment to debtors, as well as to creditors. Such consequences have resulted from the operation of our foreign attachment system, in ordinary cases; and this was foreseen and has been known to our legislators, by whom this system has been introduced, continued, and extended; but the general interest of the community in this respect has been considered as paramount to the possible and occasional inconveniences to which individuals may be sometimes subjected. A judgment debtor, in such cases, is not without relief: he may resort, whenever serious danger or loss is apprehended, either to his writ of *audita querela*, or to the powers of a court of chancery for appropriate relief."[1]

§ 624. The same views, substantially, influenced the courts of Pennsylvania,[2] Delaware,[3] Alabama,[4] Mississippi,[5] Indiana,[6] and Illinois,[7] to the same conclusion; and while there is much force in the contrary reasons, it is difficult to lay aside the demands of

[1] Gager *v.* Watson, 11 Conn. 168.

[2] Crabb *v.* Jones, 2 Miles, 130; Sweeny *v.* Allen, 1 Penn. State, 380; Fithian *v.* New York & Erie R. R. Co., 31 Ibid. 114.

[3] Belcher *v.* Grubb, 4 Harrington, 461.

[4] Skipper *v.* Foster, 29 Alabama, 330.

[5] Gray *v.* Henby, 1 Smedes & Marshall, 598; O'Brien *v.* Liddell, 10 Ibid. 371.

[6] Halbert *v.* Stinson, 6 Blackford, 398.

[7] Minard *v.* Lawler, 26 Illinois, 301.

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public policy, in favor of subjecting *all* of a debtor's effects, — save such as are by law expressly exempted, — to the payment of his debts. A striking illustration of the disadvantage of exempting judgment debts from attachment, would be in a case, by no means improbable, of a debtor having no visible property, and no debts due him but judgment debts, but enough of such debts to pay his own liabilities. Upon what principle of right or justice, under such circumstances, ought his creditors to be denied access by this process to the debts thus due him? Is the temporary inconvenience to which his debtors might be exposed sufficient to outweigh all the considerations in favor of subjecting them to the payment of debts, without the payment of which a fraud may be perpetrated in defiance of law?

§ 625. However strongly these reasons apply to the case of a garnishment of the judgment debtor, in the same court in which the judgment was rendered, their force is lost when the judgment is in one court and the garnishment in another. There a new question springs up, growing out of the conflict of jurisdiction which at once takes place. Upon what ground can one court assume to nullify in this indirect manner the judgments of another? Clearly the attempt would be absurd, especially where the two courts were of different jurisdictions, or existed under different governments. Take, for example, the case of a court of law attempting to arrest the execution of a decree of a court of equity for the payment of money, by garnishing the defendant; or that of a State court so interfering with the judgment of a Federal court, or *vice versâ:* it is not to be supposed that, in either case, the court rendering the judgment or decree would or should tolerate so violent an encroachment on its prerogatives and jurisdiction. This question arose in South Carolina, and it was there held, that where the fund sought to be reached is in another court, it cannot be attached;[1] and hence that a judgment in a Federal court is not the subject of attachment in a State court.[2]

§ 626. It would seem to be almost needless to remark, that the only way to subject a judgment to attachment for the payment of

[1] Young *v.* Young, 2 Hill (S. C.), 426.

[2] Burrell *v.* Letson, 2 Speers, 378. But the Supreme Court of Pennsylvania held, that a judgment debtor in a judgment recovered in New York, could be charged as garnishee in Pennsylvania. Jones *v.* New York & Erie R. R. Co., 1 Grant, 457.

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a debt of the plaintiff therein, is by garnishment of the defendant. Service of the attachment on the clerk of the court in which the judgment was obtained will not reach the judgment,[1] and much less would a seizure of the judgment record have that effect, or be at all admissible.[2]

§ 627. Where it is sought to charge a judgment debtor as garnishee, and the fact of indebtedness is in issue, the judgment in favor of the attachment defendant against the garnishee makes out a *primâ facie* case against the latter: if he has discharged it, he must show it.[3]

[1] Daley *v.* Cunningham, 3 Louisiana Annual, 55.
[2] Hanna *v.* Bry, 5 Louisiana Annual, 651.
[3] O'Brien *v.* Liddell, 10 Smedes & Marshall, 371.

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CHAPTER XXXIII.

ANSWER OF THE GARNISHEE.

§ 628. In most of the States, the manner in which a garnishee responds to the proceedings against him, is by a sworn answer to interrogatories propounded to him. This answer must be made by the garnishee in person: the power to make it under oath, cannot be conferred on another.[1] By the custom of London the garnishee might plead that he had no moneys of the defendant in his hands at the time of the garnishment, or at any time since, and put the plaintiff to prove any money in his hands; or he might discharge the attachment by waging of law, that is, coming into court and swearing, that at the time of the attachment made, or at any time since, he had not, owed not, nor did detain, nor yet has, or owes, or does detain from the defendant any money.[2] Pleading to the garnishment is still practised in some States, but in far the larger number the better mode of responding by answer is established. The present chapter will, therefore, be devoted to the consideration of the Answer of the Garnishee. This subject will be treated under the following heads: —

I. What the garnishee may be required to state, and may, *ex mero motu*, state in his answer.

II. What he may not be required to state in his answer.

III. Of amending the answer.

IV. The effect of the answer.

V. The construction to be given to the answer.

§ 629. I. *What the Garnishee may be required to state, and may,* ex mero motu, *state in his Answer.* It is the duty of a garnishee to state, with entire accuracy and distinctness, all facts that may be necessary to enable the court to decide intelligently the question of his liability. It is no less his interest to do so; for, should the defendant subsequently institute an action against him for the recovery of the debt or property in respect of which the garnishee was made liable as such, it would be of the first importance that the record in the attachment suit should show conclusively the

[1] Dickson *v.* Morgan, 7 Louisiana Annual, 490. [2] Priv. Lond. 258.

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ground upon which the garnishee was charged. And for the want of such accuracy and distinctness, a garnishee may be charged when he ought not to be, or may escape liability when in justice he should be charged.

§ 629 *a*. No statements or representations made to the plaintiff by the garnishee, before his garnishment, as to his indebtedness to the defendant, whereby the plaintiff was led to institute the garnishment proceedings, can have the effect of estopping the garnishee from denying such indebtedness in his answer. In Indiana a case of this description occurred, where the garnishee answered, denying all indebtedness, at any time, to the defendant. To this answer the plaintiff replied, in estoppel, that, before the institution of the garnishment proceedings, the garnishee admitted and represented to the plaintiff that he had made a certain purchase of property of a third person, which really belonged to the defendant; and that a portion of the purchase money remained unpaid; and that if the plaintiff would summon him as garnishee, he would pay that unpaid portion to the plaintiff; whereby the plaintiff was induced to institute the garnishment proceedings. To this reply the garnishee demurred; and in the Supreme Court it was held, that the facts therein set forth did not estop the garnishee from denying indebtedness to the defendant.[1]

[1] Lewis *v.* Prenatt, 24 Indiana, 98. The court said: "The matter alleged by way of estoppel falls very far short of being such. It consists merely of the admissions of the garnishee, and that the plaintiffs were induced thereby to commence their proceedings against him as garnishee. When, by the admission of a fact, which is not true, one draws another into a line of conduct from which he cannot recede, and which must result to his injury, if the fact be otherwise than it was represented, the party making the admission will not afterwards be permitted to show the truth to be otherwise, for the reason that he would thereby perpetrate a fraud upon the party whom he had misled.

"It is difficult to see how the doctrine could apply against a garnishee, as such. He must answer under oath, and to estop him from answering truly would be to require him to commit perjury. And then the proceeding seems designed to enforce only the rights of the defendant against the garnishee, and apply them to the satisfaction of the plaintiff's demand against him; and is not, probably, designed to enable the plaintiff to compel the performance of additional obligations which have arisen in his own behalf against the garnishee. But we need not, and do not, place the present decision upon either of the grounds last alluded to. It is sufficient that the facts pleaded do not, at any rate, constitute an estoppel. The plaintiff parted with no right, and relinquished no security; he stood exactly as he did before the garnishee made the representations to him, in all his relations with the whole world, except that he commenced his proceedings of garnishment, and thereby incurred costs. And the record informs us that the garnishee at once offered, in open court, to repair the injury by confessing judgment for such costs. We think that the demurrer should have been sustained."

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§ 630. It is also the duty of a garnishee to state in his answer every fact within his knowledge, which had destroyed the relation of debtor and creditor previously existing between him and the defendant. If he fail to disclose a fact which, if disclosed, would have prevented a judgment against him, he cannot afterwards set up that judgment in bar of a recovery on the debt he owed the defendant, and which he knew had passed into the hands of a third person before he answered as garnishee. Therefore, where A. was garnished in a suit against B., and failed in his answer to disclose the fact, — which was known to him, — that, before the garnishment, B. had applied to the District Court of the United States to be declared a bankrupt, and soon after was so declared; and judgment was accordingly rendered against A. for the debt he confessed to be owing to B.; and afterwards he was sued by the assignee in bankruptcy upon the debt, and set up as a defence the judgment rendered against him as garnishee; it was held, that, having in his answer concealed, or omitted to give notice of, a fact which he was bound to disclose, and which would have prevented a judgment against him, the defence was unavailable.[1] So, where, by law, wages due to a person are exempt from attachment, and A. gave to B. a due-bill for an amount due him for wages, and, upon being summoned as garnishee of B., answered, admitting the giving of the due-bill, but said nothing as to the consideration for which it was given, and was charged as garnishee; it was held, in an action against him by B. on the due-bill, that the judgment against him was no defence.[2]

§ 630 *a*. It often happens that the same individual is garnished in several suits against the same defendant; and in reference to such a state of fact the importance of care in the framing of the garnishee's answer in each case after the first is strikingly enforced. If the garnishments occurred at different times, the garnishee has no occasion, in answering the first, to refer to the subsequent ones; but in every subsequent case he should set forth, and bring clearly to the notice of the court, *all previous*

[1] Nugent *v.* Opdyke, 9 Robinson (La.), 453. See also Milliken *v.* Loring, 37 Maine, 408; Prescott *v.* Hull, 17 Johns. 284; Colvin *v.* Rich, 3 Porter, 175; Lamkin *v.* Phillips, 9 Ibid. 98; Foster *v.* White, Ibid. 221; Johns *v.* Field, 5 Alabama, 484; Crayton *v.* Clark, 11 Ibid. 787; Smoot *v.* Eslava, 23 Ibid. 659; Stockton *v.* Hall, Hardin, 160, Pitts *v.* Mower, 18 Maine, 361; Bunker *v.* Gilmore, 40 Ibid. 88; Handy *v* Hunt, 11 California, 343; Walling *v.* Miller, 15 Ibid. 38.

[2] Lock *v.* Johnson, 36 Maine, 464.

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garnishments, so as to secure himself against any more judgments, than the debt owing by him, or the effects in his hands, will justify. And where two or more garnishments are simultaneously made, the fact of their having been so made should be stated by the garnishee, so as to enable the court to settle the several rights of the attachers, as well as protect him. If the garnishee fail in thus presenting the facts, and, in consequence thereof, more judgments are rendered against him than the debt owing or the effects held by him authorized, he is wholly remediless. He brings upon himself a double liability by his own negligence, and the law will not protect a negligent garnishee, any more than it will justify carelessness in any other party; especially where such negligence may result to the injury of a *bonâ fide* creditor.[1] In every case of this description the second garnishment must remain unacted upon until the first has been disposed of. The garnishee cannot be discharged in the second case, because of his having been summoned in the first; for the plaintiff in the first may recover no judgment, or one for less than he claimed, and so leave effects in the garnishee's hands sufficient to meet the second. The proper course is to continue the second case until the first is finally determined.[2]

§ 631. But though the garnishee is under obligation, for his own protection and that of third parties, to state all facts within his knowledge which have destroyed the relation of debtor and creditor between him and the defendant, he cannot be allowed in his answer to make allegations, which have the effect of changing the terms of a written contract, under which he appears to be a debtor of the defendant. Therefore, where, by a written contract, the garnishee was bound to pay the defendant a certain sum of money, it was held, that he could not allege in his answer that that sum was to be paid in a certain description of bank paper.[3]

§ 632. If the garnishee was not indebted to, or did not hold property of, the defendant, he should simply and explicitly so declare. If he be in doubt whether under an existing state of facts he is chargeable, he should state all the essential facts with

[1] Houston *v.* Wolcott, 7 Iowa, 173.
[2] Cutter *v.* Perkins, 47 Maine, 557.
[3] Field *v.* Watkins, 5 Arkansas, 672.

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minuteness and precision, and leave it for the court to decide the question of his liability. And it will be advisable for him to take the same course, whenever his liability grows out of transactions in which are involved a multiplicity of facts. If he is indebted to the defendant on account of a single transaction, of simple contract, — which is the most usual case, — he should, in like manner, state the facts out of which his indebtedness arose.

§ 633. In all cases he should carefully avoid any evasion or equivocation, for an evasive answer will be treated as a nullity,[1] and any equivocation would subject the whole answer to suspicion. He should, with equal care, avoid admitting himself, in his answer, liable as garnishee when in fact he is not, for when he has once made such an admission, it is said he is estopped from afterward denying it.[2]

§ 634. The important points to be attained in framing a garnishee's answer, are fulness and explicitness. The absence from an answer of either of these qualities might in many cases subject the garnishee to a judgment against him. He should answer every pertinent interrogatory, so far as he is able, if not in his power to do so fully; otherwise, it is said in Massachusetts, he will be charged, even though he should declare his belief that he has in his hands nothing of the defendant's.[3] And there should be nothing doubtful in his expressions; for, on the ground that he might have used expressions in which there should have been no doubt, those of a doubtful kind will be construed against him.[4] The full extent and application of this last rule will be considered under the fifth head of this chapter.

§ 635. When the answer of a garnishee shall have come up to the foregoing rules, and is full and intelligible in reply to the interrogatories exhibited against him, the court will protect him from further interrogatories, in relation to the matters embraced in his answer. Thus, where the garnishee stated in his answer

[1] Scales *v.* Swan, 9 Porter, 163.
[2] Woodbridge *v.* Winthrop, 1 Root, 557.
[3] Shaw *v.* Bunker, 2 Metcalf, 376.
[4] Sebor *v.* Armstrong, 4 Mass. 206; Cleveland *v.* Clap, 5 Ibid. 201; Kelly *v.* Bowman, 12 Pick. 383; Sampson *v.* Hyde, 16 New Hamp. 492.

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that a certain sum was in his hands which had been earned by the defendant, and for which the defendant had drawn an order on him payable to a third person; and the plaintiff presented an additional interrogatory, requiring the garnishee to "*state distinctly* how much money was in his hands, at the time of the service of the writ on him, which had been earned by the defendant"; the court held, that the garnishee could not be charged in consequence of a refusal to answer this interrogatory, because it merely demanded of him to state distinctly what he had fully stated before.[1] And where the garnishee fully answered as to all matters between him and the defendant at the time of and prior to the garnishment; but refused to answer interrogatories in regard to transactions between them after the garnishment, and which he declared had no connection with any business or liabilities between him and the defendant; the court held him not chargeable by reason of his refusal to answer those interrogatories.[2]

§ 636. Whether a garnishee may in any case be charged because he refuses to answer pertinent interrogatories, must depend upon positive law, or established practice. In Vermont, it is held to be discretionary with the court to charge him or not, and that the exercise of that discretion will not be revised by a superior tribunal.[3] Ordinarily the course to be pursued under such circumstances is prescribed by statute. In some States, the garnishee may be compelled to answer by attachment of his body; or judgment by default may be taken against him, to be made final in the same manner as in the case of a defendant,—in which case the plaintiff must prove the garnishee's liability;[4] or the refusal to answer is declared to be an admission that he has effects of the defendant, or is indebted to him, to an amount sufficient to satisfy the plaintiff's demand; when judgment will go against him as if he had made the admission in terms. In this case, if there are several interrogatories, a refusal to answer one, of a material character, will not be excused because the answer to the others *implies* a response to it. The garnishee

[1] Carrique *v.* Sidebottom, 3 Metcalf, 297.
[2] Humphrey *v.* Warren, 45 Maine, 216.
[3] Worthington *v.* Jones, 23 Vermont, 546; Knapp *v.* Levanway, 27 Ibid. 298.
[4] Brotherton *v.* Anderson, 6 Missouri, 388

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must answer all, in a plain and distinct manner, or he will be made liable.[1]

§ 637. It is not necessary to the fulness and explicitness of a garnishee's answer, that it should be conformed to the technical rules of pleading. In this respect it partakes of the nature of an answer in chancery. Thus, where a garnishee answered that he owned a note of the defendant for an amount greater than his indebtedness to the defendant, and on the trial offered in evidence an instrument in all respects conformable to that described in the answer, save that it was a bond instead of a note, it was held, that the answer was substantially sustained, and that it was of no consequence that the garnishee had failed, in describing the instrument, to employ the proper legal terms.[2]

§ 638. While it will be required of a garnishee to answer fully and intelligibly all pertinent interrogatories put to him, regard will still be had to the circumstances in which he is placed, and which may prevent as full and positive an answer as would be desirable. If the answer is deficient in these respects, but it appears that the garnishee has responded as fully and positively as he could, he will not be charged for failing to do more. Thus, where the administrator of a person, who, in his lifetime had been garnished, answered "to the best of his knowledge," it was held, that, though the answer might not be sufficient, if it had come from one having certain knowledge of the business, yet as it could not be expected that the administrator should be possessed of the same degree of knowledge as the intestate, and the answer appeared to be the best that could be obtained, it was sufficient.[3] So, where a garnishee disclosed that the defendant had agreed to build a house for him, and he had agreed to pay the defendant certain sums at certain stages of the work; that he had generally paid before the instalments became due; but that he had no means of ascertaining whether, at the time he was summoned, the payments were in advance of the work or not; it was held, that he should not be charged; the answer appearing to be as definite as it could be made.[4]

[1] Deblanc v. Webb, 5 Louisiana, 82; Vason v. Clarke, 4 Louisiana Annual, 581.
[2] Ashby v. Watson, 9 Missouri, 235.
[3] Ormsby v. Anson, 21 Maine, 23.
[4] Harris v. Aiken, 3 Pick. 1.

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§ 639. A garnishee, in framing his answer, need not confine himself to matters within his own knowledge, but may introduce into it any extrinsic facts which he supposes important to a correct determination of the question of his liability, or in reference to the interests of others. Whether such facts will affect the issue will, of course, be decided by the court. It is principally in regard to the rights of third persons, not parties to the proceedings, that the introduction of such facts is desirable. They would often be without protection, unless the garnishee were at liberty thus to bring their rights under the cognizance of the court. The extrinsic facts thus introduced may be of almost any description. They may consist of writings, or verbal communications, or affidavits proceeding from third persons, and having reference to the question of his liability as garnishee.

Thus, a garnishee answered that he had executed a bond to the defendant, conditioned for the payment to him of $1,000, in one year after the death of the defendant's mother, and that he should pay the annual interest on that sum to the mother during her life; that he was informed, at the time of executing the bond, and had reason to believe, that it was originally taken by the defendant for the use of himself, his brother, two sisters, and a minor child of a deceased brother, the heirs at law of the defendant's mother; that the mother had died; that the defendant, after her death, drew an order on the garnishee for $520, stating that sum to be in full for his part of the bond; and that in the letter to the drawee, covering the order, the defendant said that the other part of the bond belonged to the other heirs of his mother; and the order and letter were annexed to and made part of the answer. It was objected that these documents could not be received as part of the answer; but the objection was overruled, on the ground that if it were not competent to the garnishee to disclose anything but what is within his own personal knowledge, the interests and rights of *cestuis que trust* would be in great jeopardy; for their property would go to pay the debts of the trustee, and he might be wholly unable to respond.[1] So, where a garnishee offered as a part of his answer, certain affidavits of third persons, the court held them admissible; and laid down the broad proposition, that a garnishee might refer to letters, statements, assignments, or other instruments

[1] Willard *v.* Sturtevant, 7 Pick. 194.

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and documents, and adopting them, make them part of his answer.[1]

In all such cases, however, it is considered, in Massachusetts, where the answer is conclusive, and cannot be controverted, that the extrinsic facts thus brought into the answer have no force in themselves, but are to be regarded only so far as the garnishee may declare his belief in their truth. They are received on the authority of his oath. If he does not believe them to be true, he ought not to make them part of his answer. If he makes them a part of his answer, and at the same time states his disbelief of their truth, the answer would so far be nugatory. Hence it is not alone the facts themselves, but the garnishee's adoption of them, and his belief in their truth, that give them weight in the question of his liability.[2] Therefore, an affidavit made by a person interested in the suit will be received, when made a part of the garnishee's answer, because it is received on the garnishee's oath, and not as the testimony of a witness.[3]

But where, on the examination of a garnishee, a letter was shown him from a third person not a party to the suit, for the purpose of establishing that the property in the garnishee's hands was not the defendant's but another's, and the garnishee authenticated the signature to the letter, but said nothing of its contents; the court refused to receive the letter as a part of his answer, because, though its genuineness was established, its contents might be untrue, and could not be presumed to be true.[4]

§ 639 *a*. It is no valid objection to an interrogatory to a garnishee, that it requires him to make a statement of his accounts with the defendant. Sometimes that might be the only mode of ascertaining the true state of the accounts of the parties; and litigants cannot be deprived of their rights, because it may occasion the garnishee some inconvenience.[5]

§ 640. It has been attempted to screen garnishees from answer-

[1] Kelly *v.* Bowman, 12 Pick. 383; Giddings *v.* Coleman, 12 New Hamp. 153; Bell *v.* Jones, 17 Ibid. 307.

[2] Hawes *v.* Langton, 8 Pick. 67; Kelly *v.* Bowman, 12 Ibid. 383.

[3] Kelly *v.* Bowman, 12 Pick. 383. But such affidavit will not be received or noticed when not made part of the garnishee's answer. Minchin *v.* Moore, 11 Mass. 90.

[4] Stackpole *v.* Newman, 4 Mass. 85.

[5] Roquest *v.* Steamer B. E. Clark, 13 Louisiana Annual, 210.

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ing interrogatories, a response to which might show them to have been parties to fraudulent sales or dispositions of personal property; but so far the courts have sustained such questions, and required disclosures, even though the effect might be to subject the garnishee to liability as such out of his own property.[1]

§ 641. II. *What the Garnishee may not be required to state in his Answer.* A very wide latitude of interrogatory is usually allowed, in endeavoring to ascertain whether the garnishee can be made liable. Almost every variety of question bearing upon this point may be propounded, and an answer required, and, where authorized by statute, or by the course of practice, compelled, by attachment of the garnishee's body. Still, there must be a limit to this power of inquisition; and the garnishee has a right to have the correctness of a proposed inquiry adjudicated by the court, and is not bound to submit to any and every conceivable investigation, without objection; or, if he objects, become liable to pay the entire debt in the main action, if his objection should prove unfounded.[2] And it seems to be conceded that the limit of investigation is to be fixed in the discretion of the court in which the garnishee is examined; the action of which will not be revised by a superior tribunal.[3] Therefore, where a garnishee after answering, was required to answer, and did answer, three sets of interrogatories in detail, and the plaintiff filed a fourth set, the garnishee prayed the opinion of the court whether he was bound to answer them, and the court decided he was not.[4]

§ 642. All interrogatories must be confined to such matters, as the law by which they are authorized, contemplates as the ground of a garnishee's liability. Thus, where a statute authorized the plaintiff to exhibit interrogatories touching the estate and effects of the defendant in possession or charge of the garnishee, or debts due and owing from him to the defendant, and one who held the office of justice of the peace was garnished, and the question was put to him how many judgments were entered on his docket in favor of the attachment defendant, and when, against whom, and

[1] Devoll *v.* Brownell, 5 Pick. 448; Neally *v.* Ambrose, 21 Ibid. 185; Lamb *v.* Stone, 11 Pick. 527.

[2] Sawyer *v.* Webb, 5 Iowa, 315.

[3] Worthington *v.* Jones, 23 Vermont, 546; Knapp *v.* Levanway, 27 Ibid. 298.

[4] Warner *v.* Perkins 8 Cushing, 518. See ante, § 635.

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for what amount they were respectively entered; it was held, that the question was illegal, and not such as the garnishee was bound to answer.[1] So, where interrogatories were propounded to a garnishee relating to personal property mortgaged to him by the defendant, to indemnify him against liabilities he had assumed for the defendant; it was held, that, as a mortgagee of goods not in possession of them could not be charged as garnishee in respect of the mortgage, the questions were impertinent, and should not be answered.[2]

§ 643. Every court will of course protect the garnishee from impertinent and vexatious questions, especially after he has fully answered. Hence, in Massachusetts, where a garnishee had so answered, and the plaintiff put further interrogatories, requiring him to state whether he had not, in conversation with third persons, said differently from the statements of his answer, the court declared that the plaintiff had no right to ask questions for the purpose of discrediting the garnishee's disclosures; that the plaintiff was bound to take the garnishee's statements under oath as truth, and could neither impeach his character nor contradict his testimony; that therefore he was not entitled to the privilege of cross-examination; and that what the garnishee might have told other persons, or said on former occasions is immaterial, and not a proper subject of inquiry.[3]

§ 644. It may be regarded as a sound rule, that a garnishee shall not be required to state in his answer anything that will deprive him of a defence against the debt to the defendant, which, if he were sued by the defendant, he might set up in bar of the action. Thus, where a garnishee answered, that, more than twenty years before he was summoned, he had given a bond to the defendant, payable on demand, the point was made whether he could be asked if he had paid the bond; and the court would not suffer the question to be put, because that would be to make him give up a defence he would have if sued by the defendant; when he might plead payment and rely on the lapse of time to support the plea.[4]

[1] Corbyn *v.* Bollman, 4 Watts & Sergeant, 342; Lyman *v.* Parker, 33 Maine, 31; Roquest *v.* Steamer B. E. Clark, 13 Louisiana Annual, 210.

[2] Callender *v.* Furbish, 46 Maine, 226.

[3] Crossman *v.* Crossman, 21 Pick. 21; Warner *v.* Perkins, 8 Cushing, 518.

[4] Gee *v.* Warwick, 2 Haywood (N. C.), 354.

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§ 645. It seems to be sustained by authority, and consonant with sound principles, that a garnishee shall not be required to state anything in his answer which will show him to have been guilty of a violation of law. Thus, where a garnishee was asked whether he had not received usurious interest of the defendant, it was held, that he could not answer affirmatively without criminating himself, and therefore should not be required to respond to the interrogatory.[1]

§ 646. It has also been held in Massachusetts, and in Maine, that a garnishee shall not be compelled to state anything which might tend to impair or impeach his title to real estate, which he derived from the defendant.[2] In New Hampshire, however, the contrary doctrine was held, in a case where the garnishee stated in his answer a conveyance of real estate to him by the defendant, and the court required an answer to supplementary interrogatories, intended to show the conveyance to have been made without consideration.[3]

§ 647. Where, however, the garnishee disclosed a conveyance of real estate by the defendant to him, it was decided that the following question might be put to him: "Is there any real estate in your possession, belonging to the defendants, which you hold in trust for them, so that you are accountable for the rents and profits thereof? or are you under any obligation to account for the proceeds of the same, or of any part thereof, if sold by you?"[4] And in a case, where it was alleged that real estate conveyed by the defendant to the garnishee was held in trust, to be disposed of for the benefit of the latter, the court decided that the garnishee might be required to answer the following question: "At the time you received a deed or deeds of land from the defendant, or at any other time since, was there any agreement in writing or by parol, that you should dispose of the same and account to him in any manner for the proceeds?"—and that, in the event of the question being answered in the affirmative, there might be a further examination as to the disposition of the proceeds.[5]

[1] Boardman v. Roe, 13 Mass. 104.
[2] Boardman v. Roe, 13 Mass. 104; Russell v. Lewis, 15 Ibid. 127; Moor v. Towle, 38 Maine, 133.
[3] Bell v. Kendrick, 8 New Hamp. 520.
[4] Russell v. Lewis, 15 Mass. 127.
[5] Hazen v. Emerson, 9 Pick. 144.

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§ 648. The extent to which privileged communications to a garnishee are protected from the searching scrutiny of a plaintiff's interrogatories seems not to have been the subject of adjudication. A question somewhat of that character was raised in Louisiana, but did not lead to the expression of any opinion by the court on the general subject. An attorney at law was garnished, and answered that he had received a sum of money on account of the defendant, whose attorney he was, but added that he had almost immediately paid it over according to his client's instructions. When questioned as to when and to whom he paid it, he refused to answer; contending that he could not answer without disclosing matters and instructions confided to him in professional confidence. But the court held, that the disclosure could not be objected to on that ground, as the time of payment was within his knowledge, independently of any communication he might have received from his client; and enforced its opinion with some instructive remarks about "a barefaced resort to such shameful evasions, under the pretence of a scrupulous regard for professional obligations."[1]

§ 649. We have seen that a garnishee may make the statements of others a part of his answer, and that, when so made, they will be received and considered. It is, however, entirely at his option to incorporate such statements in his answer, and the court will not compel him to do so against his will. Therefore, where the plaintiff delivered to the garnishee an affidavit of the defendant touching the effects in the garnishee's hands, and tending to subject them to the attachment, and requested the garnishee to make the affidavit a part of his answer, which was refused; the court decided that it had no power to compel a compliance with the plaintiff's demand.[2]

§ 650. III. *Of amending the Answer of a Garnishee.* The propriety of allowing a garnishee to amend his answer, or to put in a new answer, has in several instances been the subject of discussion, and it has uniformly been sustained. There is, indeed, no sufficient reason why an amendment in such case should not be permitted. There may be cases, where the garnishee discovers new

[1] Comstock *v.* Paie, 18 Louisiana, 479.
[2] Hawes *v.* Langton, 8 Pick. 67; Kelly *v.* Bowman, 12 Ibid. 383.

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facts, or finds that he has made an imperfect or erroneous statement; and there seems to be nothing in principle to prevent him, before final judgment, from making a more complete, perfect, and correct answer, being responsible as in all other cases for its truth. The only objection which could arise is, that a garnishee might be induced, by new suggestions and new views, to put in an answer varying from his first answer, and not true in itself. But when it is considered, that by any mode of administering the law, the garnishee may take his own time and his own counsel, and make such answer as he will, there seems to be no more danger of falsification in the one case than in the other.[1]

In Louisiana, while the discretionary authority of the court to permit amendments, where an answer is really responsive to the question, is admitted, it is yet considered that an answer which is manifestly evasive ought not to be amended, as such a practice might lead to frivolous delays.[2]

§ 651. IV. *The Effect to be given to the Garnishee's Answer.* This depends in a great measure on the statutory provisions of each State. In some States, the answer is conclusive; in others, it may be controverted. In either case, however, as to all statements of fact, given on the garnishee's personal knowledge, as well as to all declarations of his belief of facts derived from information, the answer is taken to be true;[3] in the former class of States, conclusively so; in the latter, subject to be disproved by competent evidence.

§ 652. In Massachusetts, the garnishee's liability formerly turned entirely upon his answer, and evidence collateral thereto was not admitted;[4] and so stringent was this rule, that an agreed statement of facts, signed by the garnishee, but not sworn to, and submitted by the plaintiff, defendant, and garnishee, for the decision of the court, as to the liability of the latter, was rejected by the court.[5] In the Revised Statutes of 1836, ch. 109, § 15, there

[1] Hovey *v.* Crane, 12 Pick. 167; Carrique *v.* Sidebottom, 3 Metcalf, 297; Buford *v.* Welborn, 6 Alabama, 818; Neilson *v.* Scott, 1 Rice's Digest of South Carolina Reports, 80; Murrell *v.* Johnson, 3 Hill (S. C.), 12; Smith *v.* Brown, 5 California, 118; Stedman *v.* Vickery, 42 Maine, 132; Newell *v.* Blair, 7 Michigan, 103.

[2] Davis *v.* Oakford, 11 Louisiana Annual, 379.

[3] Crossman *v.* Crossman, 21 Pick. 21; Meeker *v.* Sanders, 6 Iowa, 61.

[4] Comstock *v.* Farnum, 2 Mass. 96; Stackpole *v.* Newman, 4 Ibid. 85; Hawes *v.* Langton, 8 Pick. 67.

[5] Barker *v.* Tuber, 4 Mass. 81.

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is a slight modification of the strict rule which had prevailed, in that, while it declares the answers and statements of the garnishee shall be considered as true, in deciding how far he is chargeable, it allows either party to allege and prove any other facts, *not stated nor denied by the garnishee*, that may be material in deciding that question.[1] In Maine, and in Tennessee, the garnishee's liability is determined solely by his answer.[2]

§ 653. In most of the other States the answer is taken to be true, but is subject to be controverted and disproved. The effect given to it in this respect is, however, confined to its statements of facts. If the garnishee sets up rights or draws conclusions, arising out of or resulting from the facts stated, such rights and conclusions are necessarily subject to revision by the court.[3]

In Alabama, the answer is taken to be strictly true, and if a deed is appended to it, it is to be considered genuine, unless the answer be traversed.[4] In Missouri,[5] Illinois,[6] Arkansas,[7] and Louisiana,[8] the same effect is given to the answer until it is disproved.

§ 654. In ascertaining the effect to be given to an answer, when assailed by opposing testimony, but few cases can be found. In Illinois, the question came up, and it was held, that the answer is not entitled to have the same effect as that of a defendant to a bill in chancery, requiring the testimony of two witnesses, or what may be equivalent, to overthrow it, but is to be considered as presenting a *primâ facie* defence, liable to be rebutted by preponderating testimony.[9] In Pennsylvania, where, under the statute of 1789, the garnishee was held to be chargeable *until he*

[1] Gouch *v.* Tolman, 10 Cushing, 104.

[2] Lamb *v.* Franklin Man. Co., 18 Maine, 187; Cheatham *v.* Trotter, Peck, 198; Childress *v.* Dickins, 8 Yerger, 113.

[3] Lamb *v.* Franklin Man. Co., 18 Maine, 187.

[4] Robinson *v.* Rapelye, 2 Stewart, 86.

[5] Davis *v.* Knapp, 8 Missouri, 657; McEvoy *v.* Lane, 9 Ibid. 48; Stevens *v.* Gwathmey, Ibid. 636; Black *v.* Paul, 10 Ibid. 103.

[6] Kergin *v.* Dawson, 6 Illinois (1 Gilman), 86; Rankin *v.* Simonds, 27 Ibid. 352.

[7] Mason *v.* McCampbell, 2 Arkansas, 506; Britt *v.* Bradshaw, 18 Ibid. 530.

[8] Oakey *v.* M. & A. Railroad Co., 13 Louisiana, 570; Blanchard *v.* Vargas, 18 Ibid. 486; McDowell *v.* Crook, 10 Louisiana Annual, 31; Helme *v.* Pollard, 14 Ibid. 306; Barnes *v.* Wayland, Ibid. 791.

[9] Kergin *v.* Dawson, 6 Illinois (1 Gilman), 86.

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discharged himself, at least by his own oath, it was considered that the answer is *primâ facie* sufficient, but that its truth might be inquired into by the jury; and that the plaintiff makes out his case merely by destroying the effect of the answer, unless the garnishee maintains the issue by other satisfactory evidence; and this the plaintiff may do by disproving the matter alleged in the answer, or by showing the garnishee to be utterly unworthy of credit. On this principle, evidence which falsifies any fact asserted in the answer, goes to the credibility of the garnishee, and is therefore competent.[1] In Mississippi, it is ruled that where the truth of the answer is denied, it cannot be read to the jury impanelled to try the issue.[2] If, however, upon such a trial the plaintiff reads the answer to the jury, it is held, in Pennsylvania, that it must be taken as *primâ facie* evidence, not requiring of the garnishee other proof to establish it;[3] and in Alabama, that it has the effect only of an admission of the garnishee, and is governed by the same rules as any other admission.[4] In Maryland, the answer is regarded not as part of the pleading, but as evidence, and if any part of it be read the whole must be; as well that which discharges as that which charges the garnishee; and the whole is to be received as *primâ facie* evidence of the facts stated in it, open, however, to be rebutted.[5] In Illinois, the garnishee is entitled to have his answer before the jury, who may give it such weight as they may believe it entitled to, in connection with all the circumstances of the case.[6] But in South Carolina[7] and Alabama[8] the answer is not admissible evidence in the garnishee's favor. And so in Wisconsin.[9]

§ 655. As to the evidence which may be given against the garnishee's answer, it is held, in Missouri, that his admissions in conversation, either before or after the answer is sworn to, are admissible to disprove the statements of the answer.[10] In Massa-

[1] Adlum *v.* Yard, 1 Rawle, 163. [2] Lasley *v.* Sisloff, 7 Howard (Mi.), 157.
[3] Erskine *v.* Sangston, 7 Watts, 150.
[4] Myatt *v.* Lockhart, 9 Alabama, 91.
[5] Devries *v.* Buchanan, 10 Maryland, 210.
[6] Schwab *v.* Gingerick, 13 Illinois, 697.
[7] Dawkins *v.* Gault, 5 Richardson, 151.
[8] Myatt *v.* Lockhart, 9 Alabama, 91; Price *v.* Mazange, 31 Ibid. 701; Sevier *v.* Throckmorton, 33 Ibid. 512.
[9] Keep *v.* Sanderson, 12 Wisconsin, 352.
[10] Stevens *v.* Gwathmey, 9 Missouri, 636. See Carroll *v.* Finley, 26 Barbour, 61.

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chusetts, on the contrary, in the cases previously referred to[1] it was decided, that what the garnishee might have told other persons, or said, on former occasions, is immaterial, and the garnishee could not be questioned in regard thereto. It is quite certain, however, that declarations of the defendant are not admissible in evidence for the plaintiff against the garnishee;[2] nor are admissions by an agent of the garnishee.[3] But whatever evidence may be given to controvert his answer, must go to disprove the facts therein stated. It is not admissible for the plaintiff to assail the answer by impeaching the garnishee's credibility.[4]

§ 656. V. *The Construction to be given to the Garnishee's Answer.* The necessity of fulness and explicitness in the garnishee's answer, previously adverted to, is illustrated and enforced by the rule which has obtained in Massachusetts, in relation to doubtful expressions contained in an answer. We will trace the rise and progress of this rule.

The matter came up at an early day in a case where the liability of the garnishee turned on the point whether a draft drawn on, and accepted by him, in favor of the defendant, was negotiable. If it was, he could not, under the statute, be charged; otherwise he could. In his answer he stated his acceptance of the draft, and that *he thought* it was payable to the defendant *or order*. "But," said the court, "he must be positive as to this fact. He has had time to inquire, and he does not move the court for leave to make any further declaration on this point. If he, in whose knowledge the fact ought to be, is doubtful, the court cannot make any presumption in his favor."[5] In the next case the court go a step further, and say, "If the statement in any part be doubtful, we must construe it against the trustees, who might have used expressions in which there should be no doubt."[6] Again the court say, "The answer of a trustee being his own language, must unquestionably in all cases be construed most strongly against himself. But his language is not to be distorted nor forced into any unnatural construction; nor can inferences be drawn from any real or supposed discrepancies in his answers,

[1] Crossman *v.* Crossman, 21 Pick. 21; Warner *v.* Perkins, 8 Cushing, 518; Ante, § 643.
[2] Enos *v.* Tuttle, 3 Conn. 27; Cahoon *v.* Ellis, 18 Vermont, 500.
[3] Baltimore & Ohio R. R. Co. *v.* Gallahue, 12 Grattan, 655.
[4] Barnes *v.* Wayland, 14 Louisiana Annual, 791.
[5] Sebor *v.* Armstrong, 4 Mass. 206.
[6] Cleveland *v.* Clap, 5 Mass. 201; Sampson *v.* Hyde, 16 New Hamp. 492.

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against the fair and natural import of the language taken altogether."[1] The rules laid down in these cases were applied by the same court to a case where the question of the garnishee's liability turned on a statement in his answer with regard to the disposition made of certain provisions, *the most* of which, he said, had been consumed in a particular way. If they had *all* been so consumed, the garnishee would not be charged; otherwise he might be. The court adjudged him liable, because he did not answer with sufficient precision, when it was in his power to have done so.[2]

Subsequently, the rule was limited in its application to cases where the garnishee, in some part of his answer, makes statements, which, unexplained, would *primâ facie* subject him to liability.[3] The last case cited seems to be one of this character. There, the garnishee was *primâ facie* liable, and endeavored to avoid liability by a statement concerning the provisions in his hands. That statement being deficient in precision and fulness, the court would not receive it as a protection against the *primâ facie* liability appearing by the answer.

§ 657. In Louisiana, a statutory provision exists, declaring that a garnishee's "refusal or neglect to answer interrogatories shall be considered as a confession of his having in his hands property belonging to the debtor, sufficient to satisfy the demand made against the debtor." Under this provision this question was put to the garnishee: "Have you received cotton or other produce from the defendants or from any member of the firm? At what time? How much cotton or produce?" The garnishee answered, "that he had received cotton from the defendants, for account of other persons, which had been duly appropriated according to directions received with said cotton, previous to the service of the attachment or garnishment in this case." The answer was held to be evasive, and not responsive to the question, and the garnishee was charged.[4]

§ 658. This subject elicited from the late Justice STORY the

[1] Kelly *v.* Bowman, 12 Pick. 383; United States *v.* Langton, 5 Mason, 280; Giddings *v.* Coleman, 12 New Hamp. 153; Sampson *v.* Hyde, 16 Ibid. 492; Scott *v.* Ray, 18 Pick. 360; Ormsbee *v.* Davis, 5 Rhode Island, 442.

[2] Graves *v.* Walker, 21 Pick. 160.

[3] Shearer *v.* Handy, 22 Pick. 417.

[4] Hart *v.* Dahlgreen, 16 Louisiana, 559.

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following judicious remarks, which, though applicable to the peculiar system of Maine, will be regarded favorably in all cases where the question of the garnishee's liability is to be decided by the terms of his answer. "It is said that where parties, summoned as trustees, fail to discharge themselves, by any ambiguity in their disclosures, they are to be adjudged trustees. That proposition requires many qualifications, and may be true or not, according to circumstances. If upon the disclosure it is clear that there are goods, effects, or credits of the debtor in the hands of a trustee, but it is left uncertain by the disclosure whether the goods, effects, or credits are affected by interests, liens, or claims of third persons or not, and the trustee has knowledge of all the facts, and withholds them, or evades a full examination; that may furnish a good ground to presume everything against him, so far as there are ambiguities. But if he fully and clearly discloses all he knows, and upon the whole evidence it is left in reasonable doubt whether, under all the circumstances, he be trustee or not; in such case, I apprehend, he is entitled to be discharged. A different doctrine would be most perilous to the supposed trustee; because he possesses no power to compel disclosures from third persons relative to the property; and no extraneous or collateral evidence of third persons is admissible in the suit, to establish or discharge his liability. It is to be decided solely and exclusively by his answer. He might, upon any other doctrine, be innocently compelled to pay over the same property twice to different persons holding adverse rights, because he might be without any adequate means of self-protection. The law, therefore, will not adjudge him a trustee, except upon clear and determinate evidence drawn from his own answers."[1] In another case the same eminent jurist said: "I agree that doubtful expressions may be construed most strongly against the trustees, if they admit of two interpretations; but they are not to be tortured into an adverse meaning or admission. The answers are not to be more rigidly, or differently construed from what they would be in a bill in chancery. If the answers are not full, the plaintiff is at liberty to propound closer interrogatories; but he is not to charge parties upon a mere slip or mistake of certainty, or because they do not positively answer, what in conscience they do not positively know."[2]

[1] Gordon v. Coolidge, 1 Sumner, 537. [2] United States v. Langton, 5 Mason, 280.

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CHAPTER XXXIV.

JUDGMENT AGAINST THE GARNISHEE.

§ 658 *a*. We have seen that an indispensable prerequisite to a judgment against the garnishee is the rendition of a judgment against the defendant.[1] There is no doubt that that fact should be shown in the record; else the judgment against the garnishee will appear without foundation.[2] But the question arises, What constitutes the record in a garnishment proceeding? and this depends upon the manner in which that proceeding is instituted. If the garnishee is summoned under an attachment, the true view seems to be, that the garnishment, though in some sense a distinct suit, belongs to, and is a part of, the record in the attachment suit.[3] But there are two other modes in which garnishees may be summoned in courts of law, viz.: 1. By statutory proceeding under a judgment, but not under an execution on the judgment; and 2. By a statutory proceeding under an execution. In the former, there is necessarily some step to be taken by the judgment plaintiff, to initiate the garnishment; in the latter, there is generally nothing required but the issue of an execution, under which garnishees may be summoned, as under an attachment. In the latter form of proceeding, the record of the case against the garnishee is the execution, the return of the officer thereon, the interrogatories to, and answer of, the garnishee, and the judgment; and in such a record the date and amount of the judgment against the defendant necessarily and sufficiently appear by the execution. But in the other case, how is the fact of the rendition of the judgment, or the amount thereof, to appear? In Alabama, in such case, it is necessary for the judgment plaintiff, in order "to obtain process of garnishment against any person supposed to be indebted to the defendant, in any cause *where execution cannot issue on the judgment*,

[1] Ante, § 460.

[2] Zurcher *v.* Magee, 2 Alabama, 253; Blair *v.* Rhodes, 5 Ibid. 618; Case *v.* Moore, 21 Ibid. 758; Bean *v.* Barney, 10 Iowa, 498; Toll *v.* Knight, 15 Ibid. 370.

[3] Walker, J., in Faulks *v.* Heard, 31 Alabama, 516. In Rankin *v.* Simonds, 27 Illinois, 352, it was held, that the interrogatories to, and answer of, the garnishee are part of the record, and need not be preserved by a bill of exceptions.

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to make affidavit that such person is supposed to be indebted to, or have effects of the defendant in his possession or under his control, and that he believes process of garnishment against such person is necessary to obtain satisfaction of such judgment." The record in such a case would consist of the affidavit and summons, the return of the officer, and the interrogatories, answer, and judgment in the garnishment proceeding. The judgment against the defendant is, properly speaking, no portion of the record, unless incorporated into the judgment against the garnishee, or made part of the record by a bill of exceptions.[1] Indeed, it was held, that a judgment against the garnishee in such a proceeding was fatally defective, because it did not *recite* the amount of the judgment against the defendant;[2] but this, perhaps, is more strict than necessary. It should be enough if, in any way, in the record of the garnishment proceeding, the amount of that judgment appears. And this was the view taken by the Supreme Court of Alabama, where the affidavit set forth the date and amount of the judgment against the defendant, and the judgment entry against the garnishee recited that he waived objection to the rendition of a judgment against him, because of its not appearing, as required by the terms of the statute above quoted, *that no execution could issue on the judgment* against the defendant. The court held, that his admission, contained in this waiver and his answer, was an admission of the existence of the judgment described in the affidavit, and was sufficient proof, as against him, of that fact.[3] But where, in such a proceeding, the affidavit did not show the amount of the judgment against the defendant, it was held, that any judgment against the garnishee was erroneous.[4]

§ 658 *b*. It is not necessary, unless required by statute, that the judgment against the garnishee should be taken at the time of that against the defendant. Forbearance of the plaintiff to take it then, is no waiver of his right to do so afterward.[5] In Alabama it is held, that when a garnishee submits to answer, he continues before the court, for the purpose of receiving its judgment upon his answer, until after judgment shall have been ren

[1] Gunn *v.* Howell, 27 Alabama, 663; Faulks *v.* Heard, 31 Ibid. 516.
[2] Faulks *v.* Heard, 31 Alabama, 516.
[3] Jackson *v.* Shipman, 28 Alabama, 488.
[4] Stickley *v.* Little, 29 Illinois, 315.
[5] Sturges *v.* Kendall, 2 Louisiana Annual, 565.

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dered against the defendant;[1] and that judgment may be rendered against the garnishee at a term subsequent to that at which it was given against the defendant;[2] and that in such case, the garnishee is not entitled to notice of the motion for the judgment.[3] And in Louisiana, in a case where the garnishee's answer had been suffered to remain six years without any proceeding upon it, it was not regarded as releasing the garnishee from the jurisdiction of the court, but, coupled with other facts, as having great weight with the court in relieving him against any proceedings which might be hard or precipitate against him.[4]

§ 658 *c*. When in an attachment suit, the question arises whether there shall be a judgment against the garnishee, the case is ordinarily between him and the plaintiff alone; but the defendant is not wholly cut off from interfering to prevent the judgment. If his property in the garnishee's hands is by law exempt from execution, or if the debt due from the garnishee to him be such as the law forbids being reached by garnishment, or if the judgment against the defendant has been satisfied; he may interpose to prevent a judgment against the garnishee. But he cannot do so to set up, on behalf of the latter, a personal exemption from garnishment; this can be done only by the garnishee. Thus, where an incorporated city was garnished, and the defendant attempted to interpose the objection that a municipal corporation could not be held as garnishee, it was decided that he had no right to do so.[5]

§ 658 *d*. Nothing is more important in the taking of a judgment against a garnishee, than that he should have a fair hearing before the court on the question of his liability. If that be denied him, the judgment against him will be reversed by the revising tribunal. Thus, where a garnishee, on an examination before a commissioner, refused to answer a certain interrogatory, on the ground that it was impertinent, and the question was submitted

[1] Graves *v.* Cooper, 8 Alabama, 811; Lockhart *v.* Johnson, 9 Ibid. 223; Bostwick *v.* Beach, 18 Ibid. 80.

[2] Leigh *v.* Smith, 5 Alabama, 583; Robinson *v.* Starr, 3 Stewart, 90.

[3] Leigh *v.* Smith, 5 Alabama, 583.

[4] Slatter *v.* Tiernan, 6 Louisiana Annual, 567. The failure of an attaching plaintiff, for many years, to prosecute a garnishment proceeding to judgment against the garnishee, and the intervening insolvency of the garnishee, do not deprive the plaintiff of his right to prosecute his claim against the defendant to judgment. Noble *v.* Merrill, 48 Maine, 140.

[5] Wales *v.* Muscatine, 4 Iowa, 302; Burton *v.* District Township, 11 Ibid. 166.

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to the court whether he was legally bound to answer, and the court decided that he was, but refused to permit him, though he offered to do so, and rendered judgment against him; the judgment was reversed, on the ground that it was the duty of the court either to have recommitted the whole matter to the commissioner for further investigation, or to have taken the answer in open court.[1]

§ 658 *e*. In many States, a judgment by default may be taken against a garnishee upon his failing to answer. If he permit such a judgment, when in fact he ought not to be charged, because not a debtor to, or holding any effects of, the defendant, he is *primâ facie* guilty of negligence, and can obtain no relief, unless, by rebutting the presumption of negligence, he can induce the court to set aside the judgment, and give him leave to answer. It is not such a case as a court of equity will interfere in, though he show that the judgment is inequitable. To entitle himself to equitable relief, he must not only show that injustice has been done him by the judgment, but that the judgment was obtained without any fault or neglect on his part.[2]

When a garnishee in default comes into court, seeking to be allowed to answer, the default will not be set aside unless he show a sufficient excuse for his delinquency in not appearing and answering at the proper time. He cannot carelessly or obstinately fail to appear when required, and afterwards come in and enter his appearance, with all the rights and privileges of one who has been diligent in responding in the first instance. A negligent garnishee is no more entitled to protection than any other negligent party.[3] And he is as much bound to look after the proceedings against him, and protect himself from an improper judgment, as a defendant in an ordinary suit is. If, by his failure in this respect, the plaintiff gain an advantage over him, he is without relief. Thus, where a garnishee answered, denying indebtedness to the defendant, and afterwards the case was taken by change of venue to another county, where the plaintiff filed a replication to the answer taking issue thereon, of which no notice was given to the garnishee, and upon a trial a verdict was found against the

[1] Sawyer *v.* Webb, 5 Iowa, 315.

[2] Hair *v.* Lowe, 19 Alabama, 224; Peters *v.* League, 13 Maryland, 58; Windwart *v.* Allen, Ibid. 196; Atlantic F. & M. Ins. Co. *v.* Wilson, 5 Rhode Island, 479; Rhode Island Ex. Bank *v.* Hawkins, 6 Ibid. 198.

[3] Fifield *v.* Wood, 9 Iowa, 250; Parmenter *v.* Childs, 12 Ibid. 22.

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garnishee, which he moved to set aside; it was held, that it was his duty to take notice of what was done in the case, the same as any other party, and to follow the case; and being in default in this respect, the judgment against him could not be set aside.[1]

In Louisiana, if a garnishee fails to answer the interrogatories propounded to him, the court orders them to be taken for confessed; and under this system of practice it was held, that such an order might, in the sound discretion of the court, be set aside, and the garnishee be allowed to answer, where the order was made *before* judgment was obtained against the defendant; inasmuch as, until that event, the taking of the interrogatories for confessed could be of no benefit to the plaintiff.[2]

§ 659. Where the garnishee's liability is to be determined by his answer, either because it is by law conclusive, or because the plaintiff does not see proper to controvert its statements, the rules governing the judgment to be rendered thereon are few and simple. They may be briefly stated thus:

1. In order to charge the garnishee on his answer, there must be in it a clear admission of a debt due to, or the possession of money or other attachable property of, the defendant.[3]

2. Where there is not an explicit admission of a debt, but, from the statements of the answer, indebtedness to, or the possession of attachable property of, the defendant, clearly appears, judgment should go against the garnishee.[4]

3. If there be a debt due from the garnishee, or money in his hands, the amount of either will determine the extent of the garnishee's liability; not exceeding in any case the amount for which the plaintiff recovers judgment against the defendant.[5]

[1] Chase *v.* Foster, 9 Iowa, 429.

[2] Rose *v.* Whaley, 14 Louisiana Annual, 374.

[3] Wetherill *v.* Flanagan, 2 Miles, 243; Bridges *v.* North, 22 Georgia, 52; Allen *v.* Morgan, 1 Stewart, 9; Pressnall *v.* Mabry, 3 Porter, 105; Smith *v.* Chapman, 6 Ibid. 365; Mims *v.* Parker, 1 Alabama, 421; Foster *v.* Walker, 2 Ibid. 177; Fortune *v.* State Bank, 4 Ibid. 385; Connoley *v.* Cheeseborough, 21 Ibid. 166; Powell *v.* Sammons, 31 Ibid. 552; Estill *v.* Goodloe, 6 Louisiana Annual, 122; Harney *v.* Ellis, 11 Smedes & Marshall, 348; Brown *v.* Slate, 7 Humphreys, 112; Davis *v.* Pawlette, 3 Wisconsin, 300; Wilson *v.* Albright, 2 G. Greene, 125; Pierce *v.* Carleton, 12 Illinois, 358; People *v.* Johnson, 14 Ibid. 342; Ellicott *v.* Smith, 2 Cranch, C. C. 543; Porter *v.* Stevens, 9 Cushing, 530; Lomerson *v.* Huffman, 1 Dutcher, 625; Williams *v.* Housel, 2 Iowa, 154; Hunt *v.* Coon, 9 Indiana, 537; Reagan *v.* Pacific Railroad, 21 Missouri, 30; Driscoll *v.* Hoyt, 11 Gray, 404; Smith *v.* Clarke, 9 Iowa, 241.

[4] Baker *v.* Moody, 1 Alabama, 315; Mann *v.* Buford, 3 Ibid. 312.

[5] Hitchcock *v.* Watson, 18 Illinois, 289; Talbott *v.* Tarlton, 5 J. J. Marshall, 641;

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4. If the garnishee have property other than money, or have rendered services for the defendant, the value thereof must appear in the answer, or there can be no judgment for the plaintiff on the answer; for there is nothing from which the court could find a definite amount.[1]

5. Where the garnishee denies being indebted to, or having in his possession attachable property of, the defendant; or his answer, though vague and inartificially drawn, contains substantially a denial thereof, judgment must be rendered in his favor, unless, from the statements of the answer, it appear that the denial is untrue; in which case the denial will be disregarded and judgment rendered against him.[2]

6. Where he neither expressly admits nor denies his liability, but states all the facts, and leaves the court to decide the matter of law arising thereon, there can be no judgment against him, unless there clearly appear on the face of those facts sufficient to justify the court in pronouncing such judgment.[3] If it be left in reasonable doubt whether he is chargeable or not, he is entitled to a judgment in his favor.[4]

7. Where the answer of the garnishee discloses circumstances which raise a question of fraud in the title to property in his hands, the court will not take cognizance of, and decide that question on the answer alone, it being a question which should be referred to a jury.[5]

Wilcox *v.* Mills, 4 Mass. 218; Sanford *v.* Bliss, 12 Pick. 116; Meacham *v.* McCorbitt, 2 Metcalf, 352; Allen *v.* Hall, 5 Ibid. 263; Brown *v.* Silsby, 10 New Hamp. 521.

[1] Bean *v.* Bean, 33 New Hamp. 279.

[2] Wright *v.* Foord, 5 New Hamp. 178; Perine *v.* George, 5 Alabama, 644; Jones *v.* Howell, 16 Ibid. 695; Smith *v.* Bruner, 23 Mississippi, 508; Bebb *v.* Preston, 1 Iowa, 460.

[3] United States *v.* Langton, 5 Mason, 280; Picquet *v.* Swan, 4 Mason, 443; Rich *v.* Reed, 22 Maine, 28; Oliver *v.* Atkinson, 2 Porter, 546; Frost *v.* Patrick, 3 Smedes & Marshall, 783.

[4] Gordon *v.* Coolidge, 1 Sumner, 537; Pierce *v.* Carleton, 12 Illinois, 358; Banning *v.* Sibley, 3 Minnesota, 389; Pioneer Printing Co. *v.* Sanborn, Ibid. 413.

[5] Rich *v.* Reed, 22 Maine, 28.

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CHAPTER XXXV.

EXTENT OF GARNISHEE'S LIABILITY AS TO AMOUNT, AND AS TO THE TIME TO WHICH THE GARNISHMENT RELATES.

§ 660. As an attaching creditor can acquire, through the attachment, no greater rights against the garnishee than the defendant has, except in cases of fraud, it follows that the extent of the garnishee's liability is to be determined by the value of the defendant's property in his hands, or the amount of the debt due from him to the defendant.[1] The garnishee is a mere stakeholder between the parties, and it would be manifestly unjust, as long as he holds that position, to subject him to a judgment for a greater amount than that in his hands. Where, therefore, a person is summoned as garnishee in several actions, and discloses in any one of them that judgment has been rendered against him in a prior case for the whole amount in his hands, he will be discharged, unless the plaintiff in the prior suit can make his debt otherwise than by recourse to the garnishee.[2]

§ 661. It is a recognized right of a garnishee to discharge himself from personal liability, by delivering into court the property of the defendant which is in his hands. In such case, the property is wholly within the control of the court, and the garnishee is relieved from all responsibility therefor, and is not considered as having any further connection with or concern in the proceedings. It was, therefore, held, that under such circumstances he could not prosecute a writ of error to a decision of the court disposing of the property.[3]

§ 662. The garnishee will not, where he does not assume the attitude of a litigant, be chargeable with the costs of the proceedings against him, or of those against the defendant, unless it appear that he has sufficient in his hands for that purpose,

[1] Talbott *v.* Tarlton, 5 J. J. Marshall, 641; Wilcox *v.* Mills, 4 Mass. 218; Sanford *v.* Bliss, 12 Pick. 116; Meacham *v.* McCorbitt, 2 Metcalf, 352; Allen *v.* Hall, 5 Ibid. 263; Brown *v.* Silsby, 10 New Hamp. 521.

[2] Bullard *v.* Hicks, 17 Vermont, 198. See Robeson *v.* M. & A. Railroad Co., 13 Louisiana, 465.

[3] Lewis *v.* Sheffield, 1 Alabama, 134.

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after satisfying the debt.[1] But if he denies indebtedness, and an issue is formed to try the fact, the proceedings assume all the nature and formalities of a suit between the plaintiff and the garnishee, and all the consequences of a suit attend these proceedings. It is no longer a case in which the garnishee merely complies with the process of the court, occupying more the character of a witness than a party; but he is, to every intent, a party; and may summon witnesses, obtain continuances, &c., and swell the costs as much as the defendant could have done. In such a case, if the issue be found against him, he is liable to a judgment for the costs which have accrued on the garnishment proceedings, though there be no statute on the subject.[2] And so, if the garnishee refuses to answer, or seeks to avoid a fair investigation of his liability, he is chargeable with any costs occasioned by such conduct.[3] And so, if the amount due from him to the defendant be in controversy, and the plaintiff establish that there is more in the garnishee's hands than he admitted. But if the garnishee's admission be sustained, he is not liable for costs.[4]

§ 663. Whatever the amount of the garnishee's indebtedness to the defendant, or of the defendant's effects in his hands, over and above that of the plaintiff's judgment against the latter, no judgment can be taken against him for more than sufficient to cover the plaintiff's claim against the defendant and costs.[5] And as the judgment against him is only intended to secure the satisfaction of that against the defendant, if the plaintiff obtain satisfaction in part by other means, he can proceed against the garnishee only for the unsatisfied remainder; and if he obtain satisfaction in full, his recourse against the latter is at an end.[6]

§ 664. In this connection may properly be considered the gar-

[1] Gracy *v.* Coates, 2 McCord, 224; Walker *v.* Wallace, 2 Dallas, 113; Witherspoon *v.* Barber, 3 Stewart, 335; Breading *v.* Siegworth, 29 Penn. State, 396.

[2] Thompson *v.* Allen, 4 Stewart & Porter, 184; Newlin *v.* Scott, 26 Penn. State, 102; Breading *v.* Siegworth, 29 Ibid. 396.

[3] Randolph *v.* Heaslip, 11 Iowa, 37.

[4] Newlin *v.* Scott, 26 Penn. State, 102; Breading *v.* Siegworth, 29 Ibid. 396.

[5] Tyler *v.* Winslow, 46 Maine, 348; Hitchcock *v.* Watson, 18 Illinois, 289; Doggett *v.* St. Louis M. & F. Ins. Co., 19 Missouri, 201; Timmons *v.* Johnson, 15 Iowa, 23.

[6] Spring *v.* Ayer, 23 Vermont, 516; Thompson *v.* Wallace, 3 Alabama, 132; Price *v.* Higgins, 1 Littell, 274.

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nishee's liability for interest on his debt to the defendant, *pendente lite*. If he has put the defendant's money at interest, he is liable for the interest.[1] And where the plaintiff attaches in his own hands a debt he owes to the defendant, it has been held, that interest thereon continues to run during the pendency of the attachment.[2] But where a third person is subjected to garnishment, whether he shall be required to pay interest on his debt during the time he is restrained by the attachment from paying the debt, is a matter which has been much discussed.

§ 665. In deciding this question, the first point to be inquired into in any case is, whether the garnishee's debt to the defendant is one bearing interest by agreement, or whether the interest for which it is sought to charge him accrues by way of damages. If there was no contract of the garnishee to pay interest, he cannot be charged with it; for the plaintiff can hold him for no more than the defendant could.[3] If the interest accrues by way of damages for a wrongful detention of the principal sum by the debtor, he cannot be charged with it, because having been restrained by the garnishment from paying his debt, he is in no fault for not paying, and there is therefore no wrongful detention, and therefore no liability for damages.[4] But where the garnishee's debt is one which by contract bears interest, the latter is as much a part of the debt as the principal; and it is in reference to such cases that the question of the garnishee's liability for interest has most frequently arisen. Concerning this point, it may be laid down as a general proposition, that a garnishee ought not to be charged with interest on his debt to the defendant, while he is, by the legal operation of an attachment, restrained from making payment;[5] whether the attachment terminates in favor of the plaintiff or the defendant.[6] This applies, however, only to cases where the garnishee stands in all respects *rectus in curia*, as a

[1] Brown *v.* Silsby, 10 New Hamp. 521; Blodgett *v.* Gardiner, 45 Maine, 542.

[2] Willing *v.* Consequa, Peters C. C. 301.

[3] Lyman *v.* Orr, 26 Vermont, 119; Adams *v.* Cordis, 8 Pick. 260; Quigg *v.* Kittredge, 18 New Hamp. 137.

[4] Prescott *v.* Parker, 4 Mass. 170; Adams *v.* Cordis, 8 Pick. 260; Swamscott Machine Co. *v.* Partridge, 5 Foster, 369; Irwin *v.* Pittsburg & C. R. R. Co., 43 Penn. State, 488.

[5] Fitzgerald *v.* Caldwell, 2 Dallas, 215; Willing *v.* Consequa, Peters C. C. 301; Stevens *v.* Gwathmey, 9 Missouri, 628; Cohen *v.* St. Louis Perpetual Ins. Co., 11 Ibid. 374.

[6] Mackey *v.* Hodgson, 9 Penn. State, 468.

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mere stakeholder, and not as a litigant; and it has received important qualifications, which have in reality almost unsettled it. The courts have gone into inquiries as to whether the garnishee used the money during the pendency of the attachment; and as to the existence of fraud or collusion, or unreasonable delay occasioned by the conduct of the garnishee; and various decisions have been given, to which we will now direct attention.

In Pennsylvania, the general rule was decided to be as above stated; but it was held, that if there is any fraud or collusion, or unreasonable delay occasioned by the conduct of the garnishee, he will be charged with interest.[1]

In a case before WASHINGTON, J., in the Third Circuit, the presumption was allowed in favor of the garnishee that he had not used the money during the pendency of the attachment; but the court considered that if he did use it, it was but just that he should pay interest.[2] And the same rule was laid down by the Supreme Court of the United States.[3]

In Maine, the garnishee is entitled to the benefit of the presumption that he was ready to pay, and had reserved and was holding the money unemployed to await the decision of the cause; but where the facts rebut such presumption, he is chargeable with interest.[4]

In Massachusetts, the rule now is, in regard to a debt bearing interest, that the presumption is that the garnishee is prevented by law from paying the debt, or using the money; and if the fact be that he does not use it, he will not be chargeable with interest. But if this locking up of the fund is merely a fiction, the garnishee in truth making use of it all the time the matter is in suspense, he will be liable for interest. A figure used by the court, in a case involving this question, has much illustrative force. "The service of the writ turned the key upon the fund, but the trustee keeps the key, unlocks the chest, and takes the money in his own hands. In such case, he cannot be allowed to say, 'The fund was locked up, and therefore I will pay nothing for

[1] Fitzgerald *v.* Caldwell, 2 Dallas, 215; Updegraff *v.* Spring, 11 Sergeant & Rawle, 188; Mackey *v.* Hodgson, 9 Penn. State, 468; Irwin *v.* Pittsburg & C. R. R. Co., 43 Ibid. 488; Jackson's Ex'r *v.* Lloyd, 44 Ibid. 82.

[2] Willing *v.* Consequa, Peters, C. C. 301.

[3] Mattingly *v.* Boyd, 20 Howard Sup. Ct. 128.

[4] Norris *v.* Hall, 18 Maine, 332; Blodgett *v.* Gardiner, 45 Ibid. 542.

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the use of it.' This is the reason of the thing, and there is no authority against it."[1]

In Maryland, if the garnishee assumes the position of a litigant, he is chargeable with interest.[2]

In Virginia, if he keep the defendant's money in his hands during the pendency of the attachment, he is presumed to use it, and will be charged with interest. To avoid this, he must pay the money into court.[3]

In Georgia, the presumption is that the garnishment stays the property in the hands of the garnishee, and the law considers it to remain *in statu quo*, until ordered to be paid out by the judgment of the court. But if the fact be that the fund never was set apart or deposited, but continued mixed with the rest of the garnishee's business capital, he will be charged with interest. And it is there considered, that a resistance of the attachment by the garnishee will entitle the plaintiff to recover interest against him.[4]

In Missouri, it has been decided that the garnishee's denial of indebtedness to the defendant fully rebuts any presumption that he had had the money lying idle by him, ready to pay the plaintiff's demand when judgment should be obtained.[5]

In Ohio, it is held, that nothing short of proof that the garnishee actually held the money in readiness to be disposed of as directed by the court, will prevent his being charged with interest.[6]

The deductions from the decisions thus cited may be thus recapitulated: 1. The presumption is, generally, that the garnishee keeps the money by him, set apart for the payment of the attachment. 2. This presumption may be rebutted, either by the course of the garnishee in assuming the position of a litigant, or by any competent evidence: while in Virginia, the garnishee can avoid liability for interest only by paying the money into court; and in Massachusetts, must make it appear that he has not used the money. The course of decision, therefore, is clearly adverse to exempting a garnishee from this liability; and the probability is that eventually the rule, as laid down in Massachusetts, will be generally acquiesced in.

[1] Adams *v.* Cordis, 8 Pick. 260.

[2] Chase *v.* Manhardt, 1 Bland, 333.

[3] Tazewell *v.* Barrett, 4 Hening & Munford, 259; Templeman *v.* Fauntleroy, 3 Randolph, 434.

[4] Georgia Ins. and Trust Co. *v.* Oliver, 1 Georgia, 38.

[5] Stevens *v.* Gwathmey, 9 Missouri, 636.

[6] Candee *v.* Webster, 9 Ohio State, 452.

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§ 666. The foregoing considerations apply only to the case of the garnishee's liability to a judgment in favor of the plaintiff in attachment, for interest accrued *pendente lite*. There is, however, another question which may be considered as growing out of this, and properly noticeable here. Where the debt due from the garnishee to the defendant is not wholly consumed in meeting the attachment, and the garnishee is accountable to the defendant for a balance, after satisfying the attachment, what rule shall govern the recovery of interest by the defendant in a suit against him who was garnishee? Shall the latter be exempted from paying any interest on any part of his debt during the pendency of the attachment? or shall the exemption extend only to such part of the debt as it was necessary for him to retain to satisfy the attachment? The latter rule has been declared in Pennsylvania, where the court said: "It would be most unreasonable, when the debt claimed is a large one, and the debt for which the attachment issued is a small one, that interest should be suspended, during the pendency of the action, on the whole sum. If the debt was ten thousand dollars, and one hundred only were attached in the hands of the debtor, it would shock our understanding, — all mankind would cry out against the law, — if it pronounced that the creditor should lose the interest on his ten thousand dollars, to meet the debt of one hundred dollars."[1]

§ 667. The garnishee's liability, considered with reference to the time of the garnishment, cannot, without the aid of special statutory provision, be extended beyond the effects or credits of the defendant in his hands at the date of the garnishment. The attachment is the creature of the law, and can produce no effect which the law does not authorize. Its operation, when served, is upon the attachable interests *then* in the garnishee's possession; and it cannot be brought to bear upon any liability of the garnishee to the defendant accruing *after* its service, unless the law so declare. And if such liability at the time of the garnishment, be dependent on the happening of a contingency, which does happen afterwards, so as to create an absolute debt, yet the garnishee cannot be charged; for such was not the condition of things at the time of the garnishment.[2]

[1] Sickman *v.* Lapsley, 13 Sergeant & Rawle, 224.
[2] Williams *v.* A. & K. Railroad Co., 36 Maine, 201.

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In Massachusetts, it has been uniformly held, that the garnishee cannot be charged beyond the value of the effects in his hands, or the amount of debt due from him to the defendant, when he was summoned.[1] Therefore, where a lessee who was bound by the terms of his lease to pay his rent quarterly, was summoned as garnishee of his lessor, it was decided that he could be charged only for so many quarters' rent as were due at the time of the garnishment, and not for anything falling due thereafter.[2] So, where goods were delivered to one to be manufactured, and the contract was entire, and the job to be paid for when completed, and before its completion the owner was summoned as garnishee of the manufacturer; it was held, that the contract was an entire one, and that at the time of the garnishment there was nothing due to the latter, and that the garnishee was not chargeable.[3] So, where in an action arising from tort, a verdict was rendered for the plaintiff on the 20th of April, but no judgment was entered therein until the following 8th of May, and in the mean time, on the 29th of April, the defendant was garnished; it was decided that, as the cause of action was for a tort, on account of which the garnishee could not be charged, and as the verdict did not convert it into a debt till judgment should be rendered on it, there was nothing owing by the garnishee when he was summoned.[4] So, in Virginia, where an agent of the defendant, employed to collect rents, was garnished, it was held, that he was not chargeable on account of any rents collected by him after the garnishment.[5] The same doctrine obtains in Maine. There, where a son gave a bond to his father, for the payment of certain sums of money, and the delivery of certain quantities of provisions, at stated times in each year of his father's life, it was held, that he could not be charged as garnishee of his father for anything not actually payable when he was garnished.[6] In New Hampshire, Alabama, Louisiana, California, and Tennessee, the same rule prevails.[7]

[1] Wilcox *v.* Mills, 4 Mass. 218; Sanford *v.* Bliss, 12 Pick. 116; Meacham *v.* McCorbitt, 2 Metcalf, 352; Allen *v.* Hall, 5 Ibid. 263; Osborne *v.* Jordan, 3 Gray, 277.

[2] Wood *v.* Partridge, 11 Mass. 488; Hadley *v.* Peabody, 13 Gray, 200; Brackett *v.* Blake, 7 Metcalf, 335.

[3] Robinson *v.* Hall, 3 Metcalf, 301. See Daily *v.* Jordan, 2 Cushing, 390; Hennessey *v.* Farrell, 4 Ibid. 267; Warner *v.* Perkins, 8 Ibid. 518.

[4] Thayer *v.* Southwick, 8 Gray, 229.

[5] Haffey *v.* Miller, 6 Grattan, 454.

[6] Sayward *v.* Drew, 6 Maine, 263; Mace *v.* Heald, 36 Ibid. 136; Williams *v.* A. & K. Railroad Co., Ibid. 201; Tyler *v.* Winslow, 46 Ibid. 348.

[7] Branch Bank *v.* Poe, 1 Alabama, 396; Hazard *v.* Franklin, 2 Ibid. 349; Payne *v.*

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§ 668. This position must be distinguished from the case of the garnishee's liability in respect of *debitum in præsenti solvendum in futuro*.[1] We have previously seen that such a debt may be reached by garnishment.[2] There the debt exists at the time of the garnishment, but is payable afterward; in the cases now under consideration, the debt has no existence until after the garnishment.

§ 669. It should also be distinguished from the case of a liability existing, but uncertain as to amount, at the time of the garnishment, but which afterward becomes, as to the amount, certain. There, the garnishment will attach, and the extent of the garnishee's liability will be determined by the subsequent ascertainment of the amount due. Such was a case where an insurance company was summoned as garnishee, in respect of an amount due the defendant for a loss of property insured by the company. The loss happened before, but was not adjusted until after, the garnishment, and the company was held liable.[3] Much more, in such a case, is the company liable, after the claim of the insured for a loss has been recognized and voted to be paid.[4] But where an insurance company was garnished, after a loss, but before notice or proof thereof, and the policy issued by it to the defendant bound it to pay any loss "within sixty days *after due notice and proof thereof*"; it was held, in Maine, that the company could not be charged, because at the time of the garnishment it was uncertain and contingent whether the company would ever become liable, according to the terms of the policy, to pay anything.[5]

§ 670. But while it is true that the garnishee's liability cannot, in the absence of statutory authority, be extended beyond the effects in his hands at the time of the garnishment, it does not necessarily follow that he must be charged to that extent, without regard to what may have occurred between the time of the gar-

Mobile, 4 Ibid. 333; Roby *v.* Labuzan, 21 Ibid. 60; Bean *v.* Miss. Union Bank, 5 Robinson (La.), 333; Smith *v.* B. C. & M. Railroad, 33 New Hamp. 337; Norris *v.* Burgoyne, 4 California, 409; Davenport *v.* Swan, 9 Humphreys, 186.

[1] Branch Bank *v.* Poe, 1 Alabama, 396.

[2] Ante, § 557.

[3] Franklin F. I. Co. *v.* West, 8 Watts & Sergeant, 350. See Nevins *v.* Rockingham M. F. I. Co., 5 Foster, 22; Knox *v.* Protection Ins. Co., 9 Conn. 430; Girard Fire Ins. Co. *v.* Field, 45 Penn. State, 129; s. c. 3 Grant, 329.

[4] Swamscot Machine Co. *v.* Partridge, 5 Foster, 369.

[5] Davis *v.* Davis, 49 Maine, 282.

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nishment and that of the judgment against him. There are various modes in which the amount for which he is to be charged may be affected and decided by events occurring after he was garnished. In the language of the Supreme Court of Massachusetts, "Some liability must exist at the time the process is served in order to charge him, but that liability may be greatly modified, and even discharged, by subsequent events. Suppose one indebted to the principal is summoned as trustee, but he has various liens upon the fund, as, for instance, to indemnify himself against suretyships and liabilities for the principal. These liabilities may all be discharged, and thus leave the fund subject to the attachment; or they may be enforced, in whole or in part, and then the trustee will have a clear right to deduct from the fund the amount paid by him, in pursuance of liabilities which existed at the time of the service, and thus the fund may be diminished, or even wholly absorbed. A factor may have a large amount of goods of his principal, on which, however, he has a lien for his general balance. He may have received of his principal bills of exchange, which have gone forward, but of which the acceptance is uncertain. In this state he is summoned. He will not be chargeable for funds acquired after the service; but he may receive funds after the service, which will discharge and reverse the balance, and leave the fund liable to the trustee process; whereas, but for such acquisition of funds afterwards, the fund attached would be first liable to the factor's balance, which might thus absorb it. There are various modes, therefore, in which the question, whether trustee or not, and for what amount, may be affected and decided by events occurring after the service of the process." The case to which these views were applied was this: A. sued B. by attachment, and summoned C. as garnishee, who was at the time indebted to B., but B. was also indebted to him. After he was garnished, C. sued B. and obtained judgment against him, and when A. obtained a judgment against C. as garnishee, C. paid over only the difference between the amount of his judgment against B. and that of A.'s judgment against him. The court held, that where one is chargeable as a debtor of the defendant, the question will be, whether he holds any balance, upon a liquidation of all demands. In striking such balance he has a right to set off, from that which he acknowledges he owes the principal, any demand, which he might set off in any of the modes, allowed either by

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statute or common law, or in any course of proceeding. And as it appeared that the garnishee was entitled to the set-off in the case in hand, he was discharged.[1]

§ 671. In New Hampshire,[2] in Vermont,[3] and in Pennsylvania[4] since 1836, the garnishee is chargeable not only for the effects in his hands when he was summoned, but also for whatever may come into his hands, or become due from him to the defendant, between the time of the garnishment and that of the answer. In each case, however, this results from peculiar statutory provisions.[5] In Maryland the practice is to condemn all property of the defendant in the hands of the garnishee at the time of trial.[6] And in New York, where garnishment, as it elsewhere exists, is not known, but where the service of the attachment upon a party having property of the defendant in his possession is, in effect, an attachment of the property, it was held, as between different attaching creditors, that an attachment served on the 6th of April, upon a factor having in his hands property of the defendant, and also bills of lading of goods consigned to him by the defendant, but not yet received, was a continuing attachment, which was entitled to precedence of one served on the 15th of June, after the reception by the factor of the goods specified in the bills of lading.[7]

[1] Smith *v.* Stearns, 19 Pick. 20. See post, § 683 – 689.

[2] Edgerly *v.* Sanborn, 6 New Hamp. 397.

[3] Newell *v.* Ferris, 16 Vermont, 135; Spring *v.* Ayer, 23 Ibid. 516.

[4] Franklin F. I. Co. *v.* West, 8 Watts & Sergeant, 350; Silverwood *v.* Bellar, 8 Wharton, 420; Sheetz *v.* Hobensack, 20 Penn. State, 412.

[5] There is no sufficient reason why such statutory provisions should not be universally adopted, but cogent reasons why they should. The confinement of the operation of garnishment to the single point of time at which the garnishee is summoned, however sustained by high authority, is contrary to the custom of London, out of which our systems of attachment laws have sprung, and materially diminishes the usefulness and availability of the remedy. It would be wise, therefore, as has been recently done in Alabama and Missouri, to give garnishment the effect of holding, not only the effects in the garnishee's hands when summoned, but all coming into his hands between that time and the time of his answering.

[6] Glenn *v.* Boston & Sandwich Glass Co., 7 Maryland, 287.

[7] Patterson *v.* Perry, 5 Bosworth, 518; s. c. 10 Abbott Pr. R. 82.

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CHAPTER XXXVI.

THE GARNISHEE'S RIGHT OF DEFENCE AGAINST HIS LIABILITY TO THE DEFENDANT.

§ 672. As the attaching creditor can hold the garnishee only to the extent of the defendant's claim against the garnishee, and can acquire no rights against the latter, except such as the defendant had; and as he is not permitted to place the garnishee in any worse condition than he would be in, if sued by the defendant; it follows necessarily, that whatever defence the garnishee could urge against an action by the defendant, for the debt in respect of which he is garnished, he may set up in bar of a judgment against him as garnishee.[1] Were it otherwise, an attaching creditor might obtain a recourse against the garnishee, which the defendant could not: a proposition, the statement of which — except as to cases of fraud — is its own refutation.

§ 673. The foundation of all proceedings against garnishees is, that the plaintiff shall have an unsatisfied claim against the defendant. Whenever his claim is satisfied, he can no more subject a garnishee to liability, than he can levy on property. It is, therefore, entirely competent for the garnishee, in order to prevent a judgment against him, to show that whatever claim the plaintiff may have had against the defendant has been satisfied; and, if necessary, he may file a bill of discovery against the plaintiff to establish the fact.[2]

§ 674. No voluntary payment by a garnishee of his debt to the defendant, after the garnishment, and with a knowledge on his part of its existence, will prevent his being liable as garnishee;[3]

[1] Strong's Ex'r *v.* Bass, 35 Penn. State, 333; Myers *v.* Baltzell, 37 Ibid. 491; Edson *v.* Sprout, 33 Vermont, 77.

[2] Hinkle *v.* Currin, 1 Humphreys, 74; Baldwin *v.* Morrill, 8 Ibid. 132; Spring *v.* Ayer, 23 Vermont, 516; Thompson *v.* Wallace, 3 Alabama, 132; Price *v.* Higgins, 1 Littell, 274; Gleason *v.* Gage, 2 Allen, 410; Riddle *v.* Etting, 32 Penn. State, 412; Howard *v.* Crawford, 21 Texas, 399.

[3] Locke *v.* Tippetts, 7 Mass. 149; Johnson *v.* Carry, 2 California, 33; Home Mutual Ins. Co. *v.* Gamble, 14 Missouri, 407; Pulliam *v.* Aler, 15 Grattan, 54; Wilder *v.* Weatherhead, 32 Vermont, 765.

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but if before the garnishment the garnishee has paid his debt to the defendant, such payment is as complete a defence as it would be in an action by the defendant against him. But it must be a payment in fact, not a contrivance intended to be a payment or not, as circumstances should subsequently require. Therefore, where a person, being told that he was going to be summoned as garnishee of another, gave the other a check on a bank, and was afterwards garnished; and stated in his answer that he did not know that the check had ever been presented to the bank, and that, by an understanding between him and the defendant, it was placed in the hands of a clerk in the garnishee's store; it was held, that the garnishee might at pleasure revoke the check, and that the giving of it was no payment, and he was charged.[1] If the garnishee's liability to the defendant be one in which another is jointly bound with him, and his co-obligor, not being garnished, pay the debt, such payment is a discharge of the garnishee's liability.[2] So, likewise, if a garnishee be summoned by leaving a notice at his place of abode, and before he knows of the garnishment, he pays his debt to the defendant, such payment will be good as against the attaching creditor, though the garnishee may have suspected that the defendant demanded it from an apprehension that it might be attached.[3] So, where the defendant was employed by the garnishee in his store, at stipulated wages, and

[1] Dennie *v.* Hart, 2 Pick. 204. In Barnard *v.* Graves, 16 Pick. 41, the town of Worcester was summoned as garnishee of A., and answered, showing that defendant was employed by the town; that on a certain day a settlement of accounts was had between A. and the town, when the selectmen gave him a check on a bank for $ 210; that there being, however, a debt due from him to the town, the amount of which was not then ascertained, it was agreed that the amount of the debt, when ascertained, should be deducted from the sum to be obtained by the check; that this debt was afterwards found to amount to $ 67.58; that the defendant being also indebted to one B., in the sum of $ 19.77, it was further agreed by the selectmen and the defendant, that the check should be placed in B.'s hands, and the amount thereof paid to him by the bank, in order that he might retain the sums due from the defendant to the town and to himself; and the check was accordingly received by B., and was in his hands at the time of the garnishment. The above case of Dennie *v.* Hart was relied on as establishing that the giving of the check was no payment by the town; but the court said: "In the case of Dennie *v.* Hart, the court considered the transaction merely colorable; that the depositary of the check was the agent of the trustee himself; and that the trustee had the control of it, and might revoke it when he pleased; and the decision went on that ground. In the present case, we think the depositary was not the agent of the town, but of A., to receive and appropriate the amount of the check, and that the town could not control or revoke it. The check, therefore, was a payment of the debt due from the town to A."

[2] Jewett *v.* Bacon, 6 Mass. 60; Nash *v.* Brophy, 13 Metcalf, 476.

[3] Robinson *v.* Hall, 3 Metcalf, 301.

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always received his wages as he wanted them, keeping his own account, and crediting on the books of his employer what he received, whether money or goods; and the garnishee was summoned by leaving the process at his house on Saturday, during his temporary absence, at which time he was indebted to the defendant, but on going to his store early on the Monday morning following, he found that the defendant had credited himself with money and goods to the amount of the indebtedness; it was held, that this was a payment which discharged the garnishee.[1] So, where a garnishee was discharged, and before the plaintiff sued out a writ of error to the judgment of the court discharging him, he paid his debt to the defendant, who had recovered judgment against him therefor; it was held, that the payment was a valid defence to the garnishment, after the judgment of discharge had been reversed by the appellate court.[2] But where a corporation was summoned as garnishee, and asserted a payment to the defendant after the service of the process, without knowledge of its service, and denied that the service had been, as returned by the officer, upon the agent of the corporation; it was held, that the return was conclusive as to the manner of service, and charged the corporation with personal knowledge from the time it was stated to have been made, and that a payment by the corporation after that time would not discharge its liability.[3] Where, however, an insurance company in Boston was garnished on account of a loss for which it was in

[1] Thorne *v.* Matthews, 5 Cushing, 544. In this case was involved the construction of ch. 109, § 5, of the Revised Statutes of Massachusetts, which is in these words: "If, after the service on the trustee, but before he has any knowledge thereof, he shall in good faith make any payment .... for or on account of the goods, effects, or credits in his hands, ... he shall be allowed therefor, in the same manner as if the payment .... had been made .... before the service of the writ on him." The court said: "It was argued for the plaintiff, that if the facts disclosed show payment, it was not a payment in good faith, within the meaning of the statute; as the defendant must be presumed to have taken to himself the money and the barrel of flour, for the purpose of defeating the trustee process. Very probably it was so. But it is clear, that by payment in good faith, the statute means the good faith of the party paying, and not of the party receiving. And if, as we understand the answers, the trustee had authorized the defendant to take his pay, at his pleasure, and he took it after he knew that the trustee process had been served, but before the trustee knew that fact, the trustee could not have retracted that authority, after having knowledge of the service, without a violation of good faith. The authority given to the defendant to take his pay as he wanted it must be deemed to have been honestly and fairly given, and the very taking of the money and flour, at least to the amount due to him for wages, constituted a payment, with the same legal consequences as if the trustee, at his request, had given him the same with his own hand, and taken a receipt."

[2] Webb *v.* Miller, 24 Mississippi, 638.

[3] Woodworth *v.* Ranzehousen, 7 Cushing, 430.

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debted to the defendant, and the garnishment process was served on it about three hours before its agent, ignorant of that fact, settled the loss at Worcester, some fifty miles distant from Boston; it was held, that the payment by the agent was a discharge of the garnishee's liability.[1]

§ 674 *a*. The time at which a payment by a garnishee to a defendant was made may become very material in reference to his liability under a garnishment made on the same day and about the same time. If the garnishee set up such a payment, it is for him to show that it was made prior to the garnishment, for he is cognizant of both facts, and, better than any one else, can show their relative positions. He is not entitled to a presumption in his favor. On the contrary, the presumption will be against him, if he fails to show the true state of the facts. Thus, where the return of the officer showed the garnishment of a corporation at half past six o'clock in the forenoon, and the garnishee set up a payment made on the same day, without any evidence of the particular time, the garnishment was held to have been prior to the payment.[2]

§ 675. But while a voluntary payment, after garnishment, will not discharge the garnishee's liability, a payment under a previous garnishment will have all the force and effect of a payment prior to the institution of the suit in which it is sought to charge him; for the operation of the previous garnishment began at the time it was made, and the subsequent payment was only the consummation of a right existing at the time of the second garnishment.

§ 676. Though a garnishee make payment after his garnishment, on execution obtained against him by the defendant, yet if such execution were irregular and might have been set aside on his motion, it is held, in Missouri, to be no protection against the garnishment.[3]

§ 677. If one indebted pay his debt to a creditor of his creditor, without any authority from his creditor, and be afterwards garnished in a suit against the latter, this unauthorized payment will

[1] Spooner *v.* Rowland, 4 Allen, 485.
[2] Harris *v.* Somerset & Kennebec R. R. Co., 47 Maine, 298.
[3] Home Mutual Ins. Co. *v.* Gamble, 14 Missouri, 407.

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not avail him as a defence, and a ratification of it by the defendant after the garnishment will be ineffectual, because the *jus disponendi* in the defendant is taken away by the attachment.[1]

§ 678. If the debt of the garnishee to the defendant is barred by the statute of limitations, he may take advantage of the statute, just as he could if sued by the defendant.[2]

§ 679. If the consideration of the garnishee's debt to the defendant has failed, the garnishee may take advantage of it. Thus, where the garnishee had purchased a tract of land from the defendant, the last payment for which was due, but after the note therefor was given, the garnishee discovered that there was a judgment against the defendant which bound the land, and which he was compelled to satisfy, and the amount was greater than that of the note; it was held that he could not be charged.[3]

§ 680. If a debtor, by the default of his creditor, be discharged from his contract, he cannot, in respect of that contract, be charged as garnishee of his creditor. Thus, where A. gave his note to B. for five tons of hay, deliverable in July, 1808, on A.'s farm, and B. was not there then to receive it; it was held, that B. had no cause of action against A., and that A., therefore, could not be held as his garnishee.[4]

§ 681. Where, as in Virginia, the proceeding by foreign attachment is in chancery, the garnishee may set up any equitable defence, which shows that in equity he owes no debt to the defendant.[5] It was, therefore, held in that State, in such a proceeding, that a garnishee with whom a horse was left by the defendant for keeping, was entitled, as against the attaching creditor, to have his claim for the keeping first satisfied out of the property.[6]

[1] Sturtevant *v.* Robinson, 18 Pick. 175.

[2] Hinkle *v.* Currin, 2 Humphreys, 137; Benton *v.* Lindell, 10 Missouri, 557; Gee *v.* Cumming, 2 Haywood (N. C.), 398; Gee *v.* Warwick, Ibid. 354; Hazen *v.* Emerson, 9 Pick. 144.

[3] Sheldon *v.* Simonds, Wright, 724. See Mathis *v.* Clark, 2 Mills' Const. Ct. 456; Russell *v.* Hinton, 1 Murphey, 468; Moser *v.* Maberry, 7 Watts, 12.

[4] Jewett *v.* Bacon, 6 Mass. 60.

[5] Glassell *v.* Thomas, 3 Leigh, 113.

[6] Williamson *v.* Gayle, 7 Grattan, 152.

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§ 682. But any defence which the garnishee seeks to interpose against his liability must be such as would avail him in an action by the defendant against him. Extraneous matters having no relation to the question of his indebtedness to the defendant cannot be set up by him. It was, therefore, held, that he could not defeat the garnishment by showing that the judgment under which he was garnished did not belong to the plaintiff.[1] And so, a garnishee cannot retain from the effects in his hands anything to meet a contingent liability which he is under for the defendant. Thus, where the garnishee had held notes of the defendant for a debt, and caused them to be discounted by, and indorsed them to, a bank, and they were not yet due when the garnishment took place; it was held, that the garnishee had no claim against the defendant, and that his contingent liability as indorser of the notes was no defence to his being charged as garnishee; and the court refused to continue the cause until the maturity of the notes, in order to see whether they would be paid.[2]

§ 683. The particular defence which has given rise to the greatest amount of adjudication, is *set-off;* concerning which the rule is equally well established, that the rights of the garnishee shall not be disturbed by the garnishment. Whatever claim, therefore, he has against the defendant, and of which he could avail himself by set-off in an action between them, will be equally available to him in the same way, in the garnishment proceeding.[3] And though the set-off consist of moneys paid by the garnishee, on his verbal *assumpsit* of debts of the defendant, which he might have avoided by pleading the Statute of Frauds, the plaintiff cannot object to it; for that plea is a personal privilege which may be waived, and having been waived by the garnishee, his payment cannot be assailed on that ground.[4]

§ 684. The claim which the garnishee seeks to set off against his indebtedness to the defendant must, however, be due in the

[1] Jackson *v.* Shipman, 28 Alabama, 488.

[2] Smith *v.* B. C. & M. Railroad, 33 New Hamp. 337.

[3] Picquet *v.* Swan, 4 Mason, 443; Ashby *v.* Watson, 9 Missouri, 236; Beach *v.* Viles, 2 Peters, 675; Mattingly *v.* Boyd, 20 Howard Sup. Ct. 128; Arledge *v.* White, 1 Head, 241; Rankin *v.* Simonds, 27 Illinois, 352; Sampson *v.* Hyde, 16 New Hamp. 492; Brown *v.* Warren, 43 Ibid. 430; Strong's Ex'r *v.* Bass, 35 Penn. State, 333.

[4] McCoy *v.* Williams, 6 Illinois (1 Gilman), 584.

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same right as his indebtedness. Therefore, a garnishee answering that he is indebted to the defendant, cannot set off a claim he has, as administrator of another person, against the defendant.[1] So, if he be indebted individually to the defendant, he cannot set off a debt due from the defendant to him and another jointly.[2] So, where several garnishees were indebted, as copartners, to the defendant, who was indebted to them individually as legatees, it was held, that the two debts could not be set off against each other.[3] But where a copartnership was indebted to the defendant, and a part only of the members of the firm were garnished, it was held, in Massachusetts, that those who were summoned should be allowed the benefit of such set-offs as they, and their copartners, not summoned, were entitled to against the defendant.[4] And where A. had in his hands a fund, out of which he and B. & C. were entitled to a certain amount, and the remainder was to go to D., and A. was summoned as garnishee of D.; it was held, that he might retain not only what was due to himself, but what was due to B. & C.[5] And where two persons were summoned as garnishees, who were indebted to the defendant jointly, it was held, that they might set off against their debt to him, not only a claim which they jointly had against him, but the several claim of each of them.[6]

§ 685. Whether the garnishee's right to set-off will be restricted to debts actually due and payable from the defendant to him at the date of the garnishment, has been differently decided. In Massachusetts, New Hampshire, and Vermont, the rule is, that if the defendant *before final answer* becomes indebted to the garnishee, on any contract entered into before the garnishment, the garnishee's right of set-off exists.[7] Thus, where the garnishee, when summoned, was indebted to the defendant, but was, at the same time, liable as accommodation indorser of a note

[1] Thomas *v.* Hopper, 5 Alabama, 442.

[2] Gray *v.* Badgett, 5 Arkansas, 16.

[3] Blanchard *v.* Cole, 8 Louisiana, 160; Wells *v.* Mace, 17 Vermont, 503. See Norcross *v.* Benton, 38 Penn. State, 217.

[4] Hathaway *v.* Russell, 16 Mass. 473.

[5] Manufacturers' Bank *v.* Osgood, 12 Maine, 117.

[6] Brown *v.* Warren, 43 New Hamp. 430.

[7] Boston Type Co. *v.* Mortimer, 7 Pick. 166; Allen *v.* Hall, 5 Metcalf, 263; Swamscot Machine Co. *v.* Partridge, 5 Foster, 369; Boardman *v.* Cushing, 12 New Hamp. 105; Boston & Maine Railroad *v.* Oliver, 32 Ibid. 172; Strong *v.* Mitchell, 19 Vermont, 644; Smith *v.* Stearns, 19 Pick. 20.

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of the defendant for a larger amount, which became due after the garnishment, and was protested for non-payment, and the garnishee paid it before he made his answer; the court held, that he could set off the amount of the note against his debt to the defendant; and in giving their decision, observed: "Under these circumstances, we think he cannot be held as trustee; for it would be against justice that he should be held to pay a creditor of his debtor the only money by which he can partially indemnify himself. This question has not before arisen, but we think it quite consistent with the object and views of the legislature, and with the general tenor of the statute, that if before final answer the debtor becomes indebted to the respondent on any contract entered into before the service of the writ, the latter shall have a right of set-off, and be chargeable only with the final balance, if one should be due. This decision will not reach the case of a liability incurred after the service of a writ, or where the effect of such liability may be avoided by reasonable diligence on the part of the person liable, to procure the payment of the debt by the principal; nor where it is contingent whether the liability will ever be enforced or not; but we confine it to such a case as we have before us, in which there was an actual liability before the service of the writ, and an actual payment, by necessity, before the answer."[1]

§ 686. On the other hand, it has been decided in Delaware, that the garnishee cannot set off a note of the defendant which was not due at the time of the garnishment.[2] And where, before the garnishment, a judgment had been obtained against the garnishee, as security of the defendant, it was held, in Arkansas, to be no defence against the garnishee's liability,[3] even though after the garnishment he satisfied the judgment.[4] In Maine, it is held, that the debt due the garnishee, and which he seeks to set off against his liability to the defendant, must have been a debt due at the time of the garnishment.[5] And so in Alabama.[6] In the Circuit Court of the United States for the Third Circuit, the following case occurred. A. was summoned on the 14th of September, as garnishee of B., and in his answer admitted having

[1] Boston Type Co. v. Mortimer, 7 Pick. 166.
[2] Edwards v. Delaplaine, 2 Harrington, 322.
[3] Field v. Watkins, 5 Arkansas, 672.
[4] Watkins v. Field, 6 Arkansas, 391.
[5] Ingalls v. Dennett, 6 Maine, 79.
[6] Self v. Kirkland, 24 Alabama, 275.

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received on the 19th of September, fifty crates of earthenware belonging to the defendant, which on being sold netted $900; but stated that he was indorser on bills accepted by B., which had been protested before the garnishment, and after the garnishment were paid by him. This case it will be perceived differs from that in Massachusetts, just cited, in the important point of the garnishee's liability as indorser having been fixed before the garnishment, though, as in that case, the payment was made afterward. WASHINGTON, J., charged the jury: "This is a hard case upon the garnishee, who, at the time this attachment was levied, was liable to pay these bills, as indorser, to a much greater amount than the value of the funds of the defendant in his hands, and if he had then paid them he most undoubtedly would not have had in his hands any effects of the defendant, as he could not have been liable for more than the balance of account between him and the defendant. But until he paid them, he was not a creditor of the defendant, and of course the attachment bound the effects of the defendant in his hands, at the time it was laid, which could not be affected by subsequent credits to which he might be entitled. The law of this State is too strong to be resisted. It not only declares, that the goods and effects of the absent debtor in the hands of the garnishee shall be bound by the attachment, but that the garnishee shall plead that he had no goods and effects of the debtor in his hands when the attachment was levied, *nor at any time since;* on which the plaintiff is to take issue, and the jury are to find the fact put in issue, one way or the other. Now, until these bills were paid by the garnishee, he had no claim against the defendant; and on the 19th of September, he had goods of the defendant in his hands, which must decide the issue in favor of the plaintiff. The case must be decided precisely in the same manner as if this cause had come on before those bills were paid by the garnishee. Your verdict, therefore, must be for the plaintiff, to the amount of the effects acknowledged by the garnishee to have been in his hands, independent of those bills."[1]

The Supreme Court of Pennsylvania hold the same general doctrine. Chief Justice GIBSON thus expressed his views: "A cross demand against the defendant in an attachment may be set off by the garnishee, as it may by a defendant in any other suit,

[1] Taylor v. Gardner, 2 Washington, C. C. 488.

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but subject to the same rules and restrictions; and a defendant may not set off a demand acquired after the action was instituted. Nor may a plaintiff give evidence of a cause of action incomplete at the impetration of the writ. But set-off is in substance a cross action; and a cross demand also must have been complete when the action was instituted. In this respect the parties stand on equal ground. *Neither is allowed to get the whip hand and souse the other in costs, by starting before he was ready.*"[1]

§ 687. It may not unfrequently become a question, whether the set-off claimed by the garnishee was acquired before or after the garnishment. In such case, there is no presumption; but the garnishee, alleging the existence of the set-off before the garnishment, must support his allegation with proof.[2] If the set-off was acquired by the garnishee after the garnishment, it cannot avail him as against his liability to the defendant.[3]

§ 688. In regard to set-offs the Supreme Court of Massachusetts seem always to have entertained an expansive and equitable view of the rights of garnishees. There, as we have seen,[4] if the defendant before final answer becomes indebted to the garnishee, on any contract entered into before the garnishment, the garnishee's right of set-off exists. It is also held to be clearly the construction of the trustee process in that State, that where one is chargeable in consequence of being the debtor of the defendant, the question will be, whether he holds any balance *upon a liquidation of all demands*. In striking such balance he has a right to set off, from the debt which he acknowledges he owes the principal, any demand which he might set off in any of the modes allowed either by statute or common law, or in any course of proceeding.[5]

The following intricate and interesting case occurred in that State.

A., B., C., D., E., and F., owners of the ship Bristol, were summoned as garnishees of W. & W., to whom they were indebted in the sum of $8,463.02. But it appeared that W. & W. were indebted to D., E., and F., and the question arose whether the

[1] Pennell *v.* Grubb, 13 Penn. State, 552.
[2] Pennell *v.* Grubb, 13 Penn. State, 552.
[3] Dyer *v.* McHenry, 13 Iowa, 527.
[4] Ante, § 685.
[5] Smith *v.* Stearns, 19 Pick. 20.

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latter could set off the indebtedness of W. & W. against their respective proportion of liability as owners of the Bristol, to W. & W. The court, on this subject, take the following ground. "This right of set-off, when a part only of the debtors on the one side are creditors on the other, was formerly doubted; but is now well established in courts both of law and equity. The right in the case at bar does not depend on any statute provisions, but arises from the nature of the suit into which the trustee is thus incidentally introduced as a party. In this suit he is called upon to answer for all the goods, effects, and credits of the defendants in his hands; without regard to the nature of the demands, or to the form of action in which they would be recovered by the defendant, and even if they should be of several different kinds, requiring different forms of action. On the other hand, he is to be allowed all his demands against the defendant, of which he could avail himself in any form of action, or any mode of proceeding between himself and the defendant; whether by way of set-off on the trial, as provided by our statutes; or by setting off the judgments under an order of court; or by setting off the executions in the hands of the sheriff, as is also provided by statute. If this were not so, the trustee would be injured by having his claims thus drawn in, to be settled incidentally in a suit between strangers. In this adjustment of their mutual claims, we of course except, on both sides, all claims for unliquidated damages for mere torts." The court then take as the basis of its judgment the entire indebtedness of the owners of the Bristol to W. & W., and as the result of the position just quoted, direct to be deducted from that indebtedness all that was due from W. & W. to either of the six owners. But here another question arose. It will be remembered that W. & W. were indebted to D., E., and F., and it so happened that this indebtedness was not to either D., E., or F., alone, but to each of them jointly with other parties not concerned in the proceedings. Thus D. was owner of one sixteenth part of the ship India, to the owners of which ship W. & W. were indebted in the sum of $5,332.76. So, also, was E. owner of the same part of the same ship. F. was owner of one eighth part of the ship Lydia, to the owners of which ship W. & W. were indebted in the sum of $7,560. Now, the proportion of D., E., and F., in the debt of the Bristol to W. & W., was $1,410.50. The proportion of D. and E., each,

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in the debt of W. & W. to the owners of the India was $333.29; and the proportion of F. in the debt of W. & W. to the owners of the Lydia was $945. D., E., and F., each, claimed to deduct from the $1,410.50 their respective proportionate shares of the debts due from W. & W. to the owners of the India and the owners of the Lydia, as aforesaid. On this point the court say: "Now, as neither D., E., nor F. could have brought an action against W. & W. for the proportion due to each of them, as part owners of the ships India and Lydia, respectively, it seems difficult to set off that proportion against the claims of W. & W. On the other hand, it is an invariable principle, in every suit of this kind, that the trustee shall not be prejudiced by being made a party in a suit between strangers; and it would be highly prejudicial and injurious to him, if he were compelled to pay money, as due to one of the parties in the suit, when that same party was indebted to him in another sum which he might be unable to pay." The court proceed with the argument of the case, and finally arrive at the conclusion expressed in the following language: "In this suit a demand is made on the trustee, without any regard to technical forms, to pay whatever effects of the defendant he may have in his hands; and those effects are only what remains, after deducting all that he could retain or set off, in any lawful mode of adjustment between himself and the defendant, without regard on his part to mere technical forms. The legislature certainly intended that all just and reasonable allowances should be made to the trustee, to protect him from injury; and it is our business to make the forms of proceeding yield, in every case, to the principles of law and justice; and not to leave the will of the legislature unaccomplished, from a scrupulous adherence to technical rules. The parties will compute the amount due from each of the trustees, after allowing, according to these principles, the set-offs claimed by each; and the judgments will be entered accordingly." [1]

A later case was decided on principles of as free equity as that just considered. A testator devised and bequeathed all his property to W., on condition that he should pay all the testator's debts, and the legacies given by his will; and he also appointed W. executor of his will. Among the legacies was one of $200 to R., which was to be paid in two years after the testator's decease.

[1] Hathaway *v.* Russell, 16 Mass. 473.

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When the will was made, the testator held several promissory notes against R., amounting to $322, which were over due. W. accepted the devise and bequest made to him, but declined the trust of executor; and administration on the testator's estate, with the will annexed, was granted to a third person. G. brought an action against R., and summoned W. as R.'s trustee; and it was held, that R.'s notes, though payable to the testator, and in form to be collected in the name of his legal representative, were really the property of the defendant, and were a valid set-off, in the hands of W., against the amount which he was bound as legatee to pay to R., and being greater in amount than the legacy due R. from W., the latter was not liable as trustee.[1]

§ 688 *a*. While the garnishee's right of set-off is ordinarily unquestionable, he may sustain such a relation to the defendant, and to the moneys of the defendant in his hands, as to deprive him of that right. Thus, where a president of a corporation was also a banker, and became the depositary of the corporation's money, while he held a large amount of its over-due bonds; and, to avoid being charged as its garnishee, he attempted to set off some of those bonds against his liability as depositary; it was held, that "it would be a breach of the confidence reposed in him as depositary, as president, and as co-corporator, for him to take such an advantage of his position"; and he was charged as garnishee.[2]

§ 689. In Vermont[3] and in Alabama, it has been held that a garnishee cannot avail himself of an equitable claim against the defendant by way of set-off. Therefore, where the garnishee had in his hands a sum of money belonging to the defendant, being a balance of the proceeds of property conveyed to him in trust to secure a debt due to him, but insisted upon his right to appropriate that balance to the payment of a note made by the defendant to S. & Co., and by S. & Co. transferred to the garnishee, but without indorsement, whereby only the equitable title to the note was vested in the garnishee, while the legal title still remained in S. & Co.; it was held by the Supreme Court of Alabama, that the garnishee having only an equity, could not avail himself of it as a set-off. The court in giving their opinion

[1] Green *v.* Nelson, 12 Metcalf, 567.
[2] Fox *v.* Reed, 3 Grant, 81.
[3] Weller *v.* Weller, 18 Vermont, 55.

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use the following language: "It is certainly true that the plaintiff in the garnishment, being substituted to the legal rights of his debtor, to be enforced in this summary way, cannot maintain this proceeding to recover an equitable demand, — one upon which the debtor could not have maintained his action at law. The same principle which would limit the plaintiff to a legal ground of action would equally apply to the defendant, — he must be confined to such defences as he could have made, had his debtor, instead of the creditor of his debtor, instituted legal proceedings against him. This would seem to result from the want of adaptation in the forms of the court of law to do complete equity between the parties. If the defendant could be allowed to set up an equitable defence, while the plaintiff was confined down to his legal right of action, there would seem to be a want of mutuality in the proceeding, and the greatest injustice might sometimes be done. The plaintiff might have an equitable demand which would countervail that set up by the defendant, yet he would be unable to subject the legal demand, inasmuch as the defendant could, and he could not, set up his equitable one. Besides, in many cases it would be impossible for the court of law to adjust properly the equities between the parties, even if it possessed the jurisdiction. Such a practice of blending the legal and equitable jurisdiction of the courts, would, under their present organization, introduce the greatest confusion, uncertainty, and difficulty. The view we take is, we think, clearly indicated by the whole tenor of our decisions, and must be sustained so long as the jurisdiction of courts of equity is kept distinct from that of the law courts. If S. & Co., the payees of the note, retained the legal title, it is well settled, that, had the defendant instituted his action of assumpsit, to recover from the garnishee the balance due after satisfying the mortgage deed, the latter could not have set off the amount of the note to S. & Co. in such suit, however strong may have been his equity. We think he stands in the same condition with respect to the plaintiff in the garnishment. If he has a set-off which is *equitable*, he must assert it in a court of equity, where, for aught we can know, it may be rebutted or repelled, and countervailed by superior equities." [1]

§ 689 *a*. The right of the garnishee to deduct from his liability

[1] Loftin *v.* Shackleford, 17 Alabama, 455; Self *v.* Kirkland, 24 Ibid. 275.

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to defendant, is not confined to matters which come under the technical designation of set-off. Any damages which he may show himself entitled to recover of the defendant, and which arise out of the same transaction or contract in respect to which the plaintiff seeks to make the garnishee liable, may be so deducted. The garnishment cannot deprive him of the benefit of recoupment, or any like defense.[1]

§ 690. We have considered only those cases in which the garnishee is *indebted* to the defendant. His position is different where it is sought to charge him in respect of property of the defendant in his hands. There the question of his right to set-off will depend on the fact whether he has any lien, legal or equitable, upon the property, or any right as against the defendant, by contract, by custom, or otherwise, to hold the property, or to retain possession of it in security of some debt or claim of his own. If he has a mere naked possession of the property without any special property or lien; if the defendant is the owner, and has the present right of possession, so that he might lawfully take it out of the custody of the garnishee, or authorize another to do so, then the property is bound by the attachment in the hands of the garnishee, and he has no greater right to charge it with a debt of his own by way of set-off, than he would have had if the goods had been taken into custody by the officer, at the time of the attachment.[2]

[1] Powell *v.* Sammons, 31 Alabama, 552; Faxon *v.* Mansfield, 2 Mass. 147; Rankin *v.* Simonds, 27 Illinois, 352.

[2] Allen *v.* Hall, 5 Metcalf, 263.

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CHAPTER XXXVII.

THE GARNISHEE'S RELATION TO THE MAIN ACTION.

§ 691. WHEN one is, by garnishment, involuntarily made a party to a suit in which he has no personal interest, he should be in law fully protected by the proceedings against him. As has been often remarked, a garnishee is a mere stakeholder between the plaintiff and the defendant, having in his hands that which the law may take to pay the defendant's debt, in the event of a recovery by the plaintiff, or which he may, if no such recovery be had, be required to pay or deliver to the defendant. He stands in a position in which he cannot act voluntarily, without danger to his own interests. If he voluntarily pay his debt to the defendant, after the garnishment, we have seen that such a payment will not protect him against a judgment in the attachment suit.[1] So, on the other hand, a voluntary payment to the plaintiff will not devest the defendant's right of action against him. Any payment he may make to the plaintiff, without the authority or consent of the defendant, will be regarded in law as voluntary, unless made under legal compulsion, in the manner prescribed by law. Hence there is a necessity, as well as great propriety, that the garnishee should be enabled to ascertain whether the proceeding against him, if carried to fruition, will constitute a protection to him against a second payment to the defendant. The principles, therefore, connected with the garnishee's relation to the main action, will now receive attention.

§ 692. This subject presents itself primarily in two distinct aspects: 1. Where the defendant is personally served with process; and 2. Where the proceeding is *ex parte*, without any service of process on, or appearance by, the defendant, and where jurisdiction is acquired over him through an attachment of his property.

In the first case, the jurisdiction obtains through the service of the process on the defendant: the attachment is not the founda-

[1] Ante, § 674.

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tion of the jurisdiction, but a provisional remedy allowed to the plaintiff for the purpose of securing his demand.

In the second case, the attachment is the basis of the jurisdiction. If it be issued without legal authority, any proceedings under it are *coram non judice* and void.

In the former case, though the attachment were illegally issued, yet it is the privilege of the defendant alone to take advantage of it, and if he waive the illegality, and the effects in the garnishee's hands are subjected to the payment of his debt, the defendant is concluded by the judgment of the court, and cannot afterwards question its sufficiency to protect the garnishee.[1]

Where, however, the defendant is not personally a party to the proceeding, it is different. In such case he has a right afterwards to know that his property has been taken conformably to law; and if it be not so taken, his interest in it is not devested. If taken by a court of competent jurisdiction, upon a legal case presented for the exercise of its jurisdiction, though the proceedings be irregular, and therefore voidable, they will be conclusive upon him until reversed, and any rights of property acquired through them will be sustained. But if the court have no jurisdiction of the matter, or if jurisdiction be exercised without any legal foundation being laid for it, the whole proceeding is void, and the defendant's property is not alienated through it. His rights exist, to every intent, as if the proceeding had never taken place.[2]

§ 693. From these general propositions the following conclusions are drawn: 1. That where the defendant is personally before the court, the garnishee is not interested either in the jurisdictional legality of the proceedings, or in their practical regularity, *as against the defendant;* and 2. That where the defendant is not personally before the court, the garnishee is concerned only in the question of jurisdiction; for if that has attached, and the judgment of the court will be conclusive as to the rights of property acquired through the attachment, he will be fully protected by a payment made by him while the proceedings stand in force.

§ 694. But though, where the defendant is before the court in person, the garnishee is not concerned in the question of jurisdiction over him, yet he is directly interested in the question of juris-

[1] Featherston *v.* Compton, 3 Louisiana Annual, 380.

[2] Ante, § 84.

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diction over himself. The court may have power to hear and determine the main action, but none over the garnishee; in which case if the garnishee submit to the jurisdiction, and make payment under it, it will avail him nothing. Thus, for instance, if the law declare that a municipal corporation shall not be subjected to garnishment, and, notwithstanding, such a corporation be garnished, it matters not, that the court has jurisdiction of the defendant, and that he is before the court personally; it has no jurisdiction of the garnishee; and if the corporation submit to the jurisdiction, it will be in its own wrong, and the judgment of the court will, therefore, be no protection. So, if the law, as in Massachusetts, declare that no person shall be garnished in an action of replevin, or in an action on the case for malicious prosecution, or for slander, or in an action of trespass for assault and battery, and yet a garnishee be summoned in such an action, if he submit to the jurisdiction, it will be equally in his own wrong. But if the garnishee raise the question of jurisdiction, and it is decided against him, and the court proceeds to assert its jurisdiction by rendering judgment against him, a compulsory payment under that judgment will protect him against a subsequent action by the attachment defendant.[1]

§ 695. It follows hence, that a garnishee must, for his own protection, inquire, first, whether the court has jurisdiction of the defendant, and next, whether it has jurisdiction of himself. If the jurisdiction exists as to both, he has no concern as to the eventual protection which the judgment of the court will afford him: it will be complete.

§ 696. Such are the principles which are considered to govern this subject. We will briefly present their operation, as exhibited in the reported cases. In Mississippi, the statute declared that "every attachment issued without bond and affidavit taken and returned, is illegal and void, and shall be dismissed." There, it was held, upon writ of error sued out by a garnishee, not only that a judgment against a garnishee, where such bond and affidavit had not been taken and returned, was erroneous, because the proceedings were illegal and void;[2] but that such a judgment was no

[1] Gunn v. Howell, 35 Alabama, 144.

[2] Oldham v. Ledbetter, 1 Howard (Mi.), 43; Berry v. Anderson, 2 Ibid. 649; Ford v. Woodward, 2 Smedes & Marshall, 260.

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bar to a subsequent action by the defendant against the garnishee.[1] In Indiana, a judgment rendered by a justice of the peace against an executor, as garnishee, was decided to be no protection to him, because the statute prohibited a justice of the peace from exercising jurisdiction in any action against an executor.[2] In Alabama, on error by the garnishee, a judgment against him was reversed, because the officer who issued the attachment had no jurisdictional right to issue it, and the attachment was therefore void.[3] In Tennessee, it was decided that a garnishee might plead in abatement that neither the plaintiff nor the defendant was a citizen of that State, in which state of case the court had no jurisdiction.[4] In Louisiana, it was held, that a garnishee might plead that the law under which the proceeding against the defendant was conducted had been repealed, and therefore that the court was without jurisdiction.[5] In Kentucky, it was decided that a judgment against a garnishee in an attachment proceeding, instituted contrary to law, in a county not the defendant's residence, and in which he had not resided, was no protection to the garnishee.[6] The obvious principle upon which these and all similar cases stand is, that, as a judgment against a garnishee must be founded upon a valid judgment against the defendant, there can be no such foundation, where the judgment against the defendant is unauthorized and void.[7]

In Maryland, it is accorded to the garnishee to dispute the truth of the ground upon which the attachment issued, by way of showing cause why he should not be charged. This is upon the idea that if the alleged ground of attachment be untrue, the court has no jurisdiction of the proceeding by attachment; and that the garnishee must have a right to deny the existence of facts, which the statute declares must exist in order to give jurisdiction.[8]

[1] Ford *v.* Hurd, 4 Smedes & Marshall, 683.
[2] Harmon *v.* Birchard, 8 Blackford, 418.
[3] Dew *v.* Bank of Alabama, 9 Alabama, 323.
[4] Webb *v.* Lea, 6 Yerger, 473.
[5] Featherston *v.* Compton, 8 Louisiana Annual, 285.
[6] Robertson *v.* Roberts, 1 A. K. Marshall, 247.
[7] Pierce *v.* Carleton, 12 Illinois, 358; Atcheson *v.* Smith, 3 B. Monroe, 502; Whitehead *v.* Henderson, 4 Smedes & Marshall, 704; Matthews *v.* Sands, 29 Alabama, 136; Flash *v.* Paul, Ibid. 141; Desha *v.* Baker, 3 Arkansas, 509; Lovejoy *v.* Albree, 33 Maine, 414; Edrington *v.* Allsbrooks, 21 Texas, 186.
[8] Barr *v.* Perry, 3 Gill, 313. In this State it is also held that the garnishee may object to the *irregularity* of the proceedings against the defendant; but it is nowhere else so held. Stone *v.* Magruder, 10 Gill & Johnson, 383.

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§ 697. When, however, the jurisdiction of the court over both the defendant and the garnishee has attached, the right of the latter to inquire into or interfere with the proceedings in the main action is at an end; for all that he is interested in is, that the attachment proceedings against himself shall protect him against a second payment. That they will do so, though there be in them errors and irregularities for which the defendant might obtain their reversal, there can be no doubt.[1] It has, therefore, been always held, that a garnishee cannot avoid or reverse a judgment against him, on account of mere irregularities in the proceedings in the main action. They affect only the defendant, who alone can take advantage of them.[2] Nor can he inquire into the merits of the cause, as between the plaintiff and the defendant;[3] or, after judgment against the defendant, show that the plaintiff had no just demand against the defendant, or that the judgment ought to be altered or reversed.[4] Nor has he any such relation to the main action as will entitle him, after judgment has been rendered

[1] Atcheson *v.* Smith, 3 B. Monroe, 502; Lomerson *v.* Huffman, 4 Zabriskie, 674; Pierce *v.* Carleton, 12 Illinois, 358; Houston *v.* Walcott, 1 Iowa, 86; Stebbins *v.* Fitch, 1 Stewart, 180; Thompson *v.* Allen, 4 Stewart & Porter, 184; Gunn *v.* Howell, 35 Alabama, 144; O'Connor *v.* O'Connor, 2 Grant, 245; Schoppenhast *v.* Bollman, 21 Indiana, 280.

[2] Stebbins *v.* Fitch, 1 Stewart, 180; Parmer *v.* Ballard, 3 Ibid. 326; Thompson *v.* Allen, 4 Stewart & Porter, 184; Smith *v.* Chapman, 6 Porter, 365; St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Missouri, 421; Houston *v.* Walcott, 1 Iowa, 86; Matheny *v.* Galloway, 12 Smedes & Marshall, 475; Whitehead *v.* Henderson, 4 Ibid. 704; Flash *v.* Paul, 29 Alabama, 141; Camberford *v.* Hall, 3 M'Cord, 345; Foster *v.* Jones, 1 Ibid. 116; Chambers *v.* KcKee, 1 Hill (S. C.), 229; Lindau *v.* Arnold, 4 Strobhart, 290; Cornwell *v.* Hungate, 1 Indiana, 156. In Sergeant on Attachment, p. 100, it is said: "On this plea of *nulla bona*, the garnishee may take advantage of the irregularity of the plaintiff's proceedings in entering judgment against the defendant in the attachment, without having executed a writ of inquiry, when the declaration was in *Assumpsit*"; and reference is made to the case of Pancake *v.* Harris, 10 Serg. & Rawle, 109 It is conceived that his statement is not sustained by the case as reported. It does not appear that the garnishee made the point which controlled the decision; but we are authorized to infer that the court, *ex mero motu*, ruled the plaintiff out, on a point of practice. The plaintiff had not perfected his judgment against the defendant, by an ascertainment of *the amount*, without which it was clearly impracticable for a judgment to be rendered against the garnishee; since it is well settled, that a judgment against the defendant is an indispensable prerequisite to a judgment against the garnishee. It was expressly on the ground that the plaintiff had not perfected his judgment against the defendant, or, in other words, had obtained only an interlocutory, and not a final, judgment, that the decision was given.

[3] Hanna *v.* Lauring, 10 Martin, 563; Kimball *v.* Plant, 14 Louisiana, 511; Frazier *v.* Willcox, 4 Robinson (La.), 517; Brode *v.* Firemen's Ins. Co., 8 Ibid. 244; Planters and Merchants' Bank *v.* Andrews, 8 Porter, 404.

[4] Woodbridge *v.* Winthrop, 1 Root, 557; Heffernan *v.* Grymes, 2 Leigh, 512; Lee *v.* Palmer, 18 Louisiana, 405; Bank of Northern Liberties *v.* Munford, 3 Grant, 232.

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against him, to interfere in any arrangement between the plaintiff and defendant. He is not an assignee of the judgment against the defendant, nor has he any lien upon it; but in relation to it stands as an entire stranger.[1] But where the judgment against the defendant is invalid, the garnishee may, in any stage of the proceedings prior to judgment against himself, take advantage of that invalidity to prevent such judgment.[2]

§ 698. In Louisiana, however, a garnishee was allowed to show, as a reason why judgment should not be rendered against him, that before judgment was rendered against the defendant, the defendant was dead. This was upon the ground that the attaching creditor would, in such case, if the garnishee should be charged, obtain a preference over other creditors of the deceased, not authorized by the laws of that State.[3]

[1] Braynard *v.* Burpee, 27 Vermont, 616.
[2] Thayer *v.* Tyler, 10 Gray, 164.
[3] Allard *v.* DeBrot, 15 Louisiana, 253.

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CHAPTER XXXVIII.

WHERE ATTACHMENT IS A DEFENCE, AND THE MANNER OF PLEADING IT.

§ 699. THE operation of an attachment, against a garnishee, is compulsory. He has no choice but to pay, in obedience to the judgment of the court to whose jurisdiction he has been subjected; and the exercise of that jurisdiction effects a confiscation, for the plaintiff's benefit, of the debt due from the garnishee to the defendant. In this proceeding it is an invariable rule, that the garnishee shall not be prejudiced, or placed in any worse situation than he would have been in if he had not been subjected to garnishment; that is, if obliged, as garnishee, to pay to the plaintiff the debt he owed to the defendant, he shall not be compelled again to pay the same debt to the defendant. When, therefore, he is sued for that debt, either before or after he has been summoned as garnishee, he must be allowed to show that he has been, or is about to be, made liable to pay, or has paid, the debt, under an attachment against the defendant, in which he has been charged as garnishee. To what extent this defence will avail him, and how he may take advantage of it, will constitute the subject of the present chapter, and will be considered in reference, I. To the case of garnishment prior to or pending suit brought by the defendant; and, II. To the case of suit brought after judgment against the garnishee.

§ 700. I. *Where the Garnishment is prior to or pending suit brought by Defendant.* In England, the doctrine has long been held, that where one has been summoned as garnishee, and the defendant in the attachment, before judgment of condemnation of the debt, sues the garnishee for that debt, the latter may plead the attachment in abatement;[1] but not in bar, until judgment be recovered against him.[2]

The courts in this country seem with unanimity to have taken the same view. The question early came up in New York, in a case where a citizen of Baltimore was summoned as garnishee at that place, and afterwards, on going to New York, was sued by the

[1] Brook *v.* Smith, 1 Salkeld, 280.

[2] Nathan *v.* Giles, 5 Taunton, 558.

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defendant in the attachment suit, and pleaded the attachment. It was agreed in the case that if the court should consider the plea good, either in abatement or bar, the plaintiff should be nonsuited. KENT, C. J., after noticing the English decisions, said: "If we were to disallow a plea in abatement of the pending attachment, the defendant would be left without protection, and be obliged to pay the money twice: for we may reasonably presume, that if the priority of the attachment in Maryland be ascertained, the courts in that State would not suffer that proceeding to be defeated by the subsequent act of the defendant going abroad and subjecting himself to a suit and recovery here.

"The present case affords a fair opportunity for the settlement and application of a general rule on the subject. It is admitted by the case that the plaintiff owes a large debt to the attaching creditors; and that the defendant is a resident of Maryland. There is then no ground to presume any collusion between the defendant and the creditors who attached; and there is no pretence that the plaintiff was not timely notified of the pendency of the attachment, or that the attachment is not founded on a *bonâ fide* debt, equal at least in amount to the one due from the defendant. If the force and effect of a foreign attachment is, then, in any case to be admitted as a just defence, it would be difficult to find a sufficient reason for overruling a plea in abatement in the present case."[1]

The same views have been expressed by the Superior Court of New Hampshire,[2] by the Supreme Court of Pennsylvania,[3] by the Court of Appeals of Maryland,[4] by WASHINGTON, J., in the Circuit Court of the United States for the Third Circuit,[5] and by the Supreme Court of the United States.[6]

§ 701. In Massachusetts, it is held, that the pendency of an attachment is no cause to abate the writ; for, *non constat* that judgment will ever be rendered in the attachment suit; but that it is a good ground for a continuance while the process is pending.[7]

[1] Embree *v.* Hanna, 5 Johns. 101.
[2] Haselton *v.* Monroe, 18 New Hamp. 598.
[3] Fitzgerald *v.* Caldwell, 1 Yeates, 274; Irvine *v.* Lumbermen's Bank, 2 Watts & Sergeant, 190.
[4] Brown *v.* Somerville, 8 Maryland, 444.
[5] Cheongwo *v.* Jones, 3 Washington, C. C. 359.
[6] Wallace *v.* M'Connell, 13 Peters, 136; Mattingly *v.* Boyd, 20 Howard Sup. Ct. 128.
[7] Winthrop *v.* Carleton, 8 Mass. 456.

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This view has been adopted in Louisiana, in a case where the garnishee's answer disclosed the existence of a prior attachment, in another State, of his property, in a proceeding against him as garnishee of the same defendant. The cases are not precisely parallel, but the principle involved is the same. The court ordered a stay of further proceedings against the garnishee until the decision of the prior attachment.[1] In Vermont, the pending garnishment cannot be pleaded in abatement; but the court gives judgment against the garnishee in favor of his creditor, — the attachment defendant, — with stay of execution until the garnishee is released from the garnishment.[2]

The Supreme Court of Alabama once sustained a plea in abatement, which went to the writ;[3] but afterwards fell into the doctrine declared in Massachusetts, and sustained this position in the following language: "If it be admitted that a pending attachment may be pleaded in abatement, it by no means follows that it should be pleaded in abatement of the writ. In general, a plea in abatement gives a better writ, and in such a case the appropriate conclusion is, a prayer of judgment of the writ, and that it be quashed. But where matter can only be pleaded in abatement, and yet a better writ cannot be given, as the writ does not abate, the prayer of the plea is, 'whether the court will compel further answer.' There are many reasons why an attachment pending should not be pleaded in abatement of the writ. The entertainment of such pleas would lead to the most delicate and embarrassing questions of jurisdiction, and in the conflict an error committed by either court would lead to the injury of one of the parties litigant. Either the garnishee might be compelled to pay the debt twice, or the creditor might be injuriously affected. All these consequences are avoided by considering it as cause for suspending the action of the creditor, until the attachment against his debtor is determined, when it can be certainly known what the rights of the parties are. When, therefore, the fact of an attachment pending for the same debt is made known to the court, where the creditor of the garnishee has brought suit, it will either suspend all proceedings until the attachment suit is determined,

[1] Carroll *v.* McDonogh, 10 Martin, 609.

[2] Morton *v.* Webb, 7 Vermont, 123; Spicer *v.* Spicer, 23 Ibid. 678; Jones *v.* Wood, 30 Ibid. 268.

[3] Crawford *v.* Clute, 7 Alabama, 157.

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or render judgment with a stay of execution, which can be removed, or made perpetual, in whole or in part, as the exigency of the case may require. And as this course is equally safe, and productive of less delay, it would seem to be the most eligible."[1] The court also intimated that such a stay of execution would be directed after judgment, notwithstanding an omission or an ineffectual attempt to plead the matter in abatement.[2] In Indiana, the Supreme Court held it to be very doubtful whether a pending attachment can be pleaded in abatement, and manifested a disposition to concur in the Alabama doctrine.[3] In California that doctrine was fully concurred in.[4]

§ 702. In England, it is held, that an attachment cannot be pleaded *puis darrein continuance;* because after action brought upon a debt, it cannot be attached under the custom of London.[5] In a case before the Supreme Court of Pennsylvania, YEATES, J.,

[1] Crawford *v.* Slade, 9 Alabama, 887. See Gallego *v.* Gallego, 2 Brockenbrough, 285.

[2] Crawford *v.* Clute, 7 Alabama, 157; Crawford *v.* Slade, 9 Ibid. 887. See Fitzgerald *v.* Caldwell, 4 Dallas, 251.

[3] Smith *v.* Blatchford, 2 Indiana, 184.

[4] McFadden *v.* O'Donnell, 18 California, 160. Such are the decided cases on this point. It cannot, perhaps, be considered as yet definitively settled whether a plea in abatement will lie in such a case. My own conviction is, that such a plea should not be entertained, even where the garnishment takes place before the institution of the suit, and much less, after. In addition to the reasons against it, above set forth, there is a very cogent one in the fact that the defendant's interest may seriously suffer, by postponing the securing of the garnishee's debt to him, until his litigation with the plaintiff is terminated. The garnishee may be in doubtful circumstances, making legal proceedings against him necessary for securing the demand; or he may be about to remove or abscond out of the jurisdiction of the court, or to dispose of his property in fraud of his creditors, justifying an attachment against himself; and yet, if he may plead the attachment in abatement of a suit by the defendant against him, his debt to the defendant may be entirely lost. The garnishee can be in no wise injured by the double proceeding against him; for no court, upon being informed in a proper manner of the fact of the two proceedings, would hesitate to take such measures as would effectually secure the garnishee against double liability. This might be easily done, by suffering judgment to be rendered against him in the suit, if that were in a condition for judgment before the garnishment, and the money to be collected and held subject to the attachment. Views which would sustain those here expressed were announced by the Supreme Court of Vermont, in Hicks *v.* Gleason, 20 Vermont, 139, where it was held, that the defendant's rights to the effects in the garnishee's hands are only so far extinguished as to prevent his making any disposition of them which would interfere with their subjection to the payment of the plaintiff's demand; and that for every purpose of making any demand which may be necessary to fix the garnishee's liability to the defendant, or of securing it by legal proceedings or otherwise, the defendant's rights remain unimpaired by the garnishment; but can be exercised only in subordination to the lien thereby created.

[5] Priv. Lond. 272; 3 Leonard, 210; Palmer *v.* Hooks, 1 Ld. Raymond, 727; Savage's Case, 1 Salkeld, 291.

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assigned, no doubt, the true reason why this rule obtained in England, that when once a suit has been instituted in the superior courts of Westminster, for the recovery of a debt or demand, though it have not been followed by a judgment, the inferior courts cannot, by issuing an attachment, prevent the plaintiff from proceeding.[1] In this country, the question turns altogether upon the point whether a debt in suit can be attached.[2] Wherever the affirmative of this question is held, it must follow, of necessity, that an attachment, pending the action, may be pleaded *puis darrein continuance*. In Alabama, the point came up in a case where the action on the debt and the attachment were in the same court, and the plea was sustained.[3] But where the action and the attachment were in courts of different jurisdictions — the former in a District Court of the United States, and the latter in a State court — it was decided by the Supreme Court of the United States that the plea was bad on demurrer. In the opinion of that court on this point the following views are expressed: "The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts, that would extremely embarrass the administration of justice. If the attachment had been conducted to a conclusion, and the money recovered of the defendant, before the commencement of the present suit, there can be no doubt that it might have been set up as a payment upon the note in question. And if the defendant would have been protected *pro tanto*, under a recovery had by virtue of the attachment, and could have pleaded such recovery in bar, the same principle would support a plea in abatement, of an attachment pending prior to the commencement of the present suit. The attachment of the debt, in such case, in the hands of the defendant, would fix it there, in favor of the attaching creditor, and the defendant could not afterwards pay it over to the plaintiff. The attaching creditor would, in such case, acquire a lien upon the debt, binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, could not

[1] M'Carty *v.* Emlen, 2 Yeates, 190.
[2] See Chapter XXXII.
[3] Hitt *v.* Lacy, 3 Alabama, 104.

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fail to regard. If this doctrine be well founded, the priority of suit will determine the right. The rule must be reciprocal; and where the suit in one court is commenced prior to the institution of proceedings under attachment in another court, such proceedings cannot arrest the suit; and the maxim, *qui prior est tempore, potior est jure*, must govern the case."[1]

§ 703. Manifestly, a pending attachment should have no effect upon an action by the creditor against his debtor, unless the attachment acts directly on the latter, and not intermediately through another. Therefore, where a town placed money in the hands of its agent, to be paid to one who had been employed by the town, and before it was paid over the agent was garnished in a suit against the party to whom the money was payable; which party afterwards brought suit against the town for the sum due him; it was held, that the garnishment of the agent was no defence.[2]

§ 703 *a*. Equally manifest is it that the pendency of an attachment is no defence to an action against the garnishee by an assignee of the defendant, to recover the debt in respect of which it is sought to charge the garnishee. Thus, where an indorsee of a negotiable promissory note sued the maker thereof, who pleaded a pending garnishment of himself in an action against the payee, it was held to be no defence.[3]

§ 704. The question has arisen and been passed upon, how far the pendency of an attachment relieves the garnishee from accountability to the defendant, after the termination of the attachment suit, for interest on the debt, during the pendency of that suit. The Supreme Court of Pennsylvania held it to be clearly the general rule that a garnishee is not liable for interest while he is restrained from the payment of his debt by the legal operation of an attachment; unless it should appear that there is fraud, or collusion, or unreasonable delay occasioned by the conduct of the garnishee.[4] And it was, therefore, held, that an attachment might be pleaded in bar of interest on the debt, during the pendency of the attachment suit, although the gar-

[1] Wallace *v.* M'Connell, 13 Peters, 136.
[2] Clark *v.* Great Barrington, 11 Pick. 260.
[3] Mason *v.* Noonan, 7 Wisconsin, 609.
[4] Fitzgerald *v.* Caldwell, 2 Dallas, 215.

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nishee had not paid anything under the attachment and it had been discontinued.[1] This rule proceeds upon the presumption, that the garnishee being liable to be called upon at any time to pay the money, has not used it. But where one attaches money in his own hands, and thereby becomes both plaintiff and garnishee, no necessity exists for his holding the money to answer the attachment, and consequently no presumption can arise that he has not used it; and he will, therefore, be charged with interest during the pendency of the attachment.[2]

§ 705. In pleading a pending attachment in abatement, the plea must contain averments of all the facts necessary to give the court in which the attachment is pending jurisdiction, and must show whether the whole or what portion of the debt has been attached. A plea, therefore, setting forth that the defendant had been summoned as garnishee, under process issued on a judgment, but not stating the amount of the judgment, is bad on general demurrer.[3]

§ 706. II. *Where suit is brought after Judgment rendered against the Garnishee.* When, by a court having jurisdiction of the action, and of the person of a garnishee, judgment is rendered against him, and he has satisfied it in due course of law, such judgment is conclusive, against parties and privies, of all matters of right and title decided by the court, and constitutes a complete defence to any subsequent action by the defendant against the garnishee, for the amount which the latter was compelled to pay;[4] and this though the court be a foreign tribunal.[5] But, of course, such a judgment cannot affect the rights of any one not a party or privy to it.[6]

[1] Updegraff *v.* Spring, 11 Sergeant & Rawle, 188.

[2] Willing *v.* Consequa, Peters, C. C. 301.

[3] Crawford *v.* Clute, 7 Alabama, 157; Crawford *v.* Slade, 9 Ibid. 887.

[4] Killsa *v.* Lermond, 6 Maine, 116; Holmes *v.* Remsen, 4 Johns. Ch'y R. 460; Holmes *v.* Remsen, 20 Johns. 229; Hitt *v.* Lacy, 3 Alabama, 104; Foster *v.* Jones, 15 Mass. 185; Mills *v.* Stewart, 12 Alabama, 90; Moore *v.* Spackman, 12 Sergeant & Rawle, 287; Coates *v.* Roberts, 4 Rawle, 100; Anderson *v.* Young, 21 Penn. State, 443; Chcairs *v.* Slaten, 3 Humphreys, 101; Adams *v.* Filer, 7 Wisconsin, 306.

[5] Barrow *v.* West, 23 Pick. 270; Taylor *v.* Phelps, 1 Harris & Gill, 492; Gunn *v.* Howell, 35 Alabama, 144.

[6] Wise *v.* Hilton, 4 Maine, 435; Olin *v.* Figeroux, 1 M'Mullan, 203; Miller *v.* McLain, 10 Yerger, 245; Lawrence *v.* Lane, 9 Illinois (4 Gilman), 354; Cooper *v.* McClun, 16 Ibid. 435; Gates *v.* Kerby, 13 Missouri, 157; Funkhouser *v.* How, 24 Ibid. 44; Mankin *v.* Chandler, 2 Brockenbrough, 125; Lyman *v.* Cartwright, 3 E. D. Smith, 117.

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§ 706 *a*. A judgment in favor of the garnishee is equally conclusive against the plaintiff, though obtained by means of fraud, and even perjury, committed by the garnishee. A case arose in New Hampshire, where, after a garnishee had answered and was discharged, the plaintiff brought an action on the case against him, for obtaining his discharge by falsehood and fraud in his disclosure, averred in the declaration to have been "wholly false, fraudulent, wicked, wilful, and designed to defraud the plaintiff of his just claim against his debtor; by reason of which, the plaintiff was defrauded and prevented from recovering his debt against his debtor, and has wholly lost the same." There was a demurrer to the declaration, which was sustained, on the following grounds: "What is the foundation of the plaintiff's claim and charge? The substance of his complaint is, that the defendant had in his hands funds for which he ought to have been charged as trustee in that suit, and that by fraudulent contrivance with B. (the defendant in the attachment suit), and by falsehood and fraud in his disclosure, he obtained an unjust judgment for his discharge. The plaintiff, therefore, undertakes, as the foundation of his claim, to put in issue the precise point that was adjudged between the same parties in the former suit, to wit: whether the defendant had in his hands funds for which he ought in that process to have been charged as the trustee of B.

"The same facts that would be required to maintain this declaration, would have been sufficient to charge the defendant as trustee in the former suit. To maintain this declaration the plaintiff would be obliged to show that, by fraudulent transfers and conveyances, property of B. came into the possession of the defendant, for which he was chargeable in that suit as trustee; otherwise he would not show that the defendant's disclosure was false, or that he had suffered any damage by losing a security for the payment of his debt against B.; but if the same facts had appeared in that suit, of course the trustee would have been charged.

"It is quite manifest that in this action the plaintiff seeks to try again the same question that was tried and decided in the former suit between the same parties. This, on well-settled principles, he cannot be permitted to do; and we are not able to see any peculiar hardship in the application of so familiar a general principle to this case.

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"This action is of new impression. If the experiment should succeed, in all the numerous cases where plaintiffs seek to charge trustees on the ground of fraudulent conveyances made to them by debtors, after a judgment discharging the trustees, they might be sued again, as in this case, and the same question tried anew in another action." [1]

§ 707. The discharge of a garnishee in the attachment suit is no bar to an action by the defendant for any cause of action existing at the time of the discharge.[2] Nor does a judgment in favor of the garnishee in one attachment suit preclude his being charged as garnishee in another suit in favor of a different party, on account of the same debt.[3] Nor does the judgment against the garnishee amount to *res adjudicata*, as between him and the defendant, so as to preclude the latter from claiming more in his action than the garnishee was considered, in the attachment proceedings, to owe. Were such the case, it would be in the power of a garnishee, by confessing in his answer a smaller indebtedness than actually existed, to practise a fraud upon his creditor which would be irremediable.[4]

§ 708. Though judgment against the garnishee, and satisfaction thereof, constitute a complete bar to an action by the attachment defendant, to the extent of the amount so paid, is the judgment alone, without satisfaction, such a bar? On this point the authorities do not agree. In England, it is held, that attachment and condemnation of a debt is a bar to an action upon the same debt.[5] In this country the same has been held in Maine,[6] Massa-

[1] Lyford *v.* Demerritt, 32 New Hamp. 234.

[2] Puffer *v.* Graves, 6 Foster, 258.

[3] Spruill *v.* Trader, 5 Jones, 39; Breading *v.* Siegworth, 29 Penn. State, 396.

[4] Robeson *v.* Carpenter, 7 Martin, N. S. 30; Brown *v.* Dudley, 33 New Hamp. 511; Cameron *v.* Stollenwerck, 6 Alabama, 704; Baxter *v.* Vincent, 6 Vermont, 614. See Tams *v.* Bullitt, 35 Penn. State, 308, where it was held, that a judgment against a garnishee is no bar to an action by the assignees in insolvency of a defendant, to recover from him more than he was charged for as garnishee.

[5] Savage's Case, 1 Salkeld, 291; M'Daniel *v.* Hughes, 3 East, 367; Turbill's Case, 1 Saunders, 67, Note 1.

[6] Matthews *v.* Houghton, 11 Maine, 377; Norris *v.* Hall, 18 Ibid. 332; McAllister *v.* Brooks, 22 Ibid. 80. But it must be a final judgment, not a judgment by default merely. Therefore, where, under the practice in Maine, a garnishee was defaulted, and judgment was rendered against the goods, effects, and credits of the defendant in his hands; and afterwards, on *scire facias*, he appeared and disclosed to the court that he was not liable as garnishee, and was discharged; and afterwards, when sued by the

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chusetts,[1] Florida,[2] and Indiana.[3] In the Circuit Court of the United States for the Third Circuit, Justice WASHINGTON held, that a judgment in attachment, where the attachment was laid on effects in the plaintiff's hands, might be pleaded in bar, by way of offset, or given in evidence on notice.[4] In Pennsylvania and Maryland, however, it is held, that, to entitle the garnishee to a plea in bar, it must appear that he has been compelled to pay the debt, or that an execution has been levied on his property.[5] And in Georgia, it was held, in an action by an indorsee against the maker of a promissory note, transferred to him after the maker had been summoned as garnishee, that the recovery of judgment against the garnishee, without satisfaction, did not constitute a defence to the action; and that if, after judgment obtained against the maker of the note, he should satisfy the judgment rendered against him as garnishee, the judgment on the note would thereby be extinguished; except, perhaps, for costs.[6] And in Alabama it is held, that satisfaction of the judgment against the garnishee is necessary to absolve him from liability.[7] And so in Texas.[8]

The Supreme Court of Massachusetts, however, has somewhat modified its first ruling on this subject, holding that where it does not appear that execution has been awarded against the garnishee, and that he has been called on or compelled to pay, it is not such a payment, merger, or discharge of the original debt as to be pleaded in bar.[9]

defendant, undertook to set up the judgment by default in bar of the action; it was held to be no bar, although the judgment by default was rendered before, and the discharge of the garnishee ordered after, the commencement of the defendant's suit against him. Sargeant v. Andrews, 3 Maine, 199.

[1] Perkins v. Parker, 1 Mass. 117; Hull v. Blake, 13 Ibid. 153.

[2] Sessions v. Stevens, 1 Florida, 233.

[3] Covert v. Nelson, 8 Blackford, 265.

[4] Cheongwo v. Jones, 3 Washington, C. C. 359.

[5] Lowry v. Lumbermen's Bank, 2 Watts & Sergeant, 210; Brown v. Somerville, 8 Maryland, 444.

[6] Brannon v. Noble, 8 Georgia, 549.

[7] Cook v. Field, 3 Alabama, 53.

[8] Farmer v. Simpson, 6 Texas, 303.

[9] Meriam v. Rundlett, 13 Pick. 511. The facts of the case were thus stated in the opinion of the court: "This is assumpsit by the indorsees against the promisors on a promissory note given at St. Louis, in the State of Missouri. The defendants plead in bar, that after the making of the note, which was given to one Oliver Hudson, upon a purchase at auction of the goods of Hudson, and in satisfaction of a precedent debt to Hudson, by Rundlett (the defendant in the action) and his partner Randolph jointly, they were attached as the garnishees of said Hudson, and upon a disclosure of the circumstances under which this note was given, they were adjudged liable as such gar-

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§ 709. A case came before STORY, J., on the circuit, in which the effect to be given to a judgment against a garnishee was con-

nishees, to Hill & M'Gunnegle, the plaintiffs in that suit. It is not alleged that they have paid over anything in pursuance of the judgment in that suit, nor is the law of Missouri set out to such an extent as to enable the court to determine what is the effect of such a judgment in that State. On oyer the judgment and proceedings are set out at length in the replication. The proceedings are detailed so far as to show that Rundlett, for the firm of Rundlett & Randolph, garnishees in the case, having in his answer admitted that they were indebted to said Oliver Hudson in the sum of $379.74, it was considered that the plaintiffs recover against said Rundlett & Randolph, garnishees as aforesaid, the said sum, &c." To this plea there was a demurrer, assigning the following causes: 1. That it does not appear from the plea, that Rundlett & Randolph have ever paid anything on account of the judgment recovered against them as garnishees, nor that they were liable to pay the same when the plea was pleaded. 2. That the facts set forth in the plea are only a ground for a continuance, and not for a plea in bar, until Rundlett & Randolph have paid the money on the judgment against them as garnishees. 3. That it appears from the record that Hill & M'Gunnegle recovered judgment against Hudson for $1,007.79, and against four other persons, as garnishees, divers sums, making together $1,724.06; and the plea does not show whether those other garnishees, or either of them, have or have not paid any part of the judgments recovered against them as garnishees.

SHAW, C. J., delivered the opinion of the court. "It has been very well settled in this Commonwealth, that a judgment against a garnishee in another State, where the court has jurisdiction of the person and of the subject-matter, will protect one here, who has been obliged to pay, or is compellable to pay, in pursuance of such judgment, although it be a debt due on a promissory note or other negotiable security, although no such judgment would have been rendered against a garnishee or trustee under our laws, and although such law appears to us a little unreasonable.

"He who pays under the judgment of a tribunal having legal jurisdiction to decide, and adequate power over the person or property to compel obedience to its decisions, has an indisputable claim to protection. But upon general principles, one who has not yet been compelled to pay, and who may never be obliged to pay to another, who has attached the debt in his hands, although he may have good right to insist that proceedings ought not to be commenced or prosecuted against him, whilst his hands are tied, and he is legally prohibited from paying his debt, and so may have good ground for an abatement or stay of proceedings, seems in no condition to deny the plaintiff's right to recover his debt, absolutely and forever.

"In examining the record of the judgment, as set out in the replication, it does not appear that any execution has ever been awarded. But it does appear that the whole debt due to the plaintiffs in that suit, as settled by the judgment, was $1,007.79 with costs; and that other garnishees were charged, in precisely the same terms with the defendants, in several sums, which, together with the judgment against the defendants, made upwards of $2,100, that is, more than double the amount. It is impossible, therefore, to consider, that these debts became absolutely transferred and made debts due from the garnishees to the attaching creditor: the more rational inference, therefore, would be, that by the law of that State such judgment is deemed to operate as a sequestration, as a *lien*, making these sums chargeable and liable in the hands of the garnishees to the amount of the attaching creditor's debt, and no further. If this is not a just inference, if the effect of this adjudication was absolutely to transfer the debt, to extinguish the relation of debtor and creditor between the garnishee and the original proprietor and present indorser of the note, the law of Missouri, giving it that extraordinary effect, should have been set out; but as it is not done, the plea in bar cannot be supported."

The court then enter upon an examination of the attachment law of Missouri, and find there a sufficient ground for affirming the position previously announced, "that the

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sidered, where it appeared that the plaintiff in the attachment had, by his neglect to comply with the local laws, put his judgment in a state of suspension, so that execution could not issue upon it, and it could not be revived by a *scire facias*. The court there held, that the lien of the judgment against the garnishee was lost by the *laches* of the plaintiff, and that the judgment was no defence against an action for the debt.[1]

§ 710. There can be no doubt that where a part or the whole of the debt of the garnishee to the defendant has been paid under the judgment against him, such payment is as effectual a bar, either *pro tanto* or complete, to a subsequent action by the defendant upon that debt, as if the payment had been made to the defendant himself.[2] And where, in an action against the garnishee, by his creditor, the attachment defendant, the agreed statement of facts submitted to the court was silent as to whether the amount of the judgment against the garnishee was equal to his debt to the defendant, it was presumed it was so.[3] And a payment of a debt by one of several joint debtors under garnishment, is a good defence for all against a suit by the defendant.[4]

§ 711. Where a payment under a judgment against a garnishee is relied on as a defence to a suit by the attachment defendant, it is important to observe the rules upon which it will be sustained. They may be compendiously stated as follows:

1. The judgment against the garnishee, under which he alleges he made the payment, must be proved.[5]

2. It must have been a valid judgment. No payment made under a void judgment, however apparently regular the proceedings may have been, can protect the garnishee against a subsequent payment to the defendant or his representatives. Thus, where an attachment was obtained against one supposed to be living in a

judgment against the garnishees amounts to nothing more than a *lien* on the fund in their hands, and even that is a provisional one, to take effect only in case that other funds which are first chargeable shall prove insufficient. The court are, therefore, of opinion that, notwithstanding the judgment, until an execution has been awarded, and the garnishee has been called on or compelled to pay, it is not such a payment, merger, or discharge of the original debt as to be pleaded in bar, and therefore that the plea in this case, not stating either payment or execution awarded, is bad."

[1] Flower *v.* Parker, 3 Mason, 247.

[2] Brown *v.* Dudley, 33 New Hamp. 511; Gunn *v.* Howell, 35 Alabama, 144; Dole *v.* Boutwell, 1 Allen, 286.

[3] McAllister *v.* Brooks, 22 Maine, 80.

[4] Cook *v.* Field, 3 Alabama, 53.

[5] Barton *v.* Smith, 7 Iowa, 85.

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foreign country, but who was dead when the suit was commenced; it was held, that a payment made by a garnishee, under execution, was no defence against an action by the defendant's administrator; the whole proceedings in the suit being a mere nullity.[1]

3. The payment must not have been voluntary. Any payment not made under execution will be regarded as voluntary, and, therefore, no protection to the garnishee.[2]

4. The payment must be actual, and not simulated or contrived. Thus, where certain persons were charged as garnishees, and credited the plaintiff on their books with the amount of the judgment, and debited the defendant with the same amount, but did not in fact pay the money, it was held to be no payment.[3]

5. The judgment under which the payment was made must have been rendered by a court having jurisdiction of the subject-

[1] Loring *v.* Folger, 7 Gray, 505.

[2] Wetter *v.* Rucker, 1 Broderip & Bingham, 491. In Missouri, where a judgment debtor was garnished, who paid the judgment under an execution afterwards issued, but which was irregular and might have been set aside on his application, the payment was held to be no protection against the garnishment. Home Mutual Ins. Co. *v.* Gamble, 14 Missouri, 407. See Burnap *v.* Campbell, 6 Gray, 241.

[3] Wetter *v.* Rucker, 1 Broderip & Bingham, 491. The following case is reported in Maryland: A. executed to B. several notes, for different amounts, and payable at different times; and was afterwards garnished, in a suit against B., and charged in respect of all of the notes. After being so charged, A. bought the judgment which had been rendered against him as garnishee, for about one third of its amount. After this, A. was sued by an indorsee for value of one of the notes, in respect of which the judgment against him as garnishee had been rendered; and set up that judgment and the transfer of it to him, as a defence, by way of a payment under garnishment. It was held, however, that for the purposes of that case the holder of the note was to be regarded as occupying the situation of the attachment defendant, from whom he acquired the note; that the defendant would have been interested, and the holder of the note was interested in the payment of the whole amount of the judgment against A.; that A., by the purchase of the judgment, occupied no better position than any other purchaser of it would occupy; and that such purchase was no defence against the note, though as between A. and the attachment plaintiff the judgment was satisfied and closed. Brown *v.* Somerville, 8 Maryland, 444. In Connecticut, in Cutler *v.* Baker, 2 Day, 498, the following case was presented. A. sued out an attachment against B., and summoned C. as garnishee. A. having obtained judgment and execution against B., caused demand to be made upon C. for the goods and effects of B., towards satisfying the execution, but none were exposed. B. then sued C., who was still liable to A. as garnishee. C. being threatened by A. with a *scire facias* against him as garnishee, to avoid cost, gave a note in satisfaction of so much as he owed B., which note was in the following form: "Value received I promise to pay A., $344.52, with interest, whenever a certain suit in favor of B., now pending against me, shall be determined — provided said suit shall be determined in my favor — otherwise this note is to be given up to me." It was held that this was a sufficient payment to protect C. against a judgment in favor of B. It is very difficult to understand the ground for such a decision. The court gave no opinion. It is not easy to discover how the note could be considered as a payment at all, or anything more than an agreement to pay on a certain contingency; much less a payment in obedience to a legal proceeding.

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matter and the parties. If there be a defect in this respect, the payment will be regarded as voluntary, and therefore unavailing.[1] If, however, the court have jurisdiction of the subject-matter and the parties, a payment on execution under its judgment will protect garnishee, though the judgment may have been irregular, and reversible on error;[2] and a reversal of it by the defendant for irregularity, after payment by the garnishee, will not invalidate the payment.[3] But if the garnishee contest the jurisdiction of the court, and his objection is overruled, and judgment rendered against him, a payment made by him under that judgment cannot be collaterally impeached elsewhere, on the ground that the court had no jurisdiction. Its decision on that point is conclusive in favor of the garnishee.[4]

6. Though the court have jurisdiction of the parties, and its judgment be valid as against the garnishee, yet if the law require the plaintiff, as a condition precedent to obtaining execution, to do a particular act, and without performing the condition he obtain execution, and the garnishee make payment under it, the payment will be no protection; for it is in the garnishee's power to resist the payment until the condition be fulfilled; failing in which, his payment is regarded as voluntary. Thus, in Pennsylvania, where a statute required that before payment could be exacted from a garnishee, the plaintiff should give a bond to answer to the defendant, if he should, within a year and a day, disprove or avoid the debt; and a garnishee paid the amount of the judgment to the attachment plaintiff, without execution, and without such bond being given; it was held, that, as his defence to an action on the debt rested on his having been compelled by due course of law to pay it as garnishee, and he in fact had not and could not have been compelled so to pay it, the payment he had made was no defence to the action.[5] The same view was entertained in Mississippi in a similar case.[6]

[1] Harmon *v.* Birchard, 8 Blackford, 418; Ford *v.* Hurd, 4 Smedes & Marshall, 683; Robertson *v.* Roberts, 1 A. K. Marshall, 247; Richardson *v.* Hickman, 22 Indiana, 244.

[2] Atcheson *v.* Smith, 3 B. Monroe, 502; Lomerson *v.* Hoffman, 4 Zabriskie, 674; Pierce *v.* Carleton, 12 Illinois, 358; Houston *v.* Walcott, 1 Iowa, 86; Stebbins *v.* Fitch, 1 Stewart, 180; Thompson *v.* Allen, 4 Stewart & Porter, 184; Gunn *v.* Howell, 35 Alabama, 144; Webster *v.* Lowell, 2 Allen, 123.

[3] Duncan *v.* Ware, 5 Stewart & Porter, 119.

[4] Gunn *v.* Howell, 35 Alabama, 144; Wyatt's Adm'r *v.* Rambo, 29 Alabama, 510.

[5] Myers *v.* Urich, 1 Binney, 25. See Moyer *v.* Lobengeir, 4 Watts, 390.

[6] Oldham *v.* Ledbetter, 1 Howard (Mi.), 43; Grissom *v.* Reynolds, Ibid. 570.

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§ 712. In Arkansas, it was held, that to entitle a garnishee to the protection of a judgment against him as such, all the facts required by statute to enable the attachment plaintiff to hold the debt owed by the garnishee, must appear in the record of the attachment suit; and that if it appear that the attachment was not legally served on the garnishee, so as to reach the debt in his hands, his answering as garnishee, and the subsequent judgment against him, will not avail him.[1]

§ 713. The question here occurs, Is the garnishee to be held responsible for the *regularity* of the proceedings in the suit in which he is garnished? We have seen that he is not allowed to take advantage of irregularities or errors in those proceedings, in order to avoid or reverse a judgment against him.[2] Manifestly, then, there can be not the least obligation on him to watch their regularity, nor can he in any way be held responsible for it.[3]

§ 714. In order to entitle one to plead an attachment as a conclusive defence, there should be no neglect, collusion, or misrepresentation on his part, in the progress of the attachment suit. For if his conduct be deceptive, and his statements untrue, and especially if this be so in collusion with the attachment plaintiff, the judgment will not be considered conclusive against his creditor.[4]

In Delaware a case arose, where the judgment against the garnishee, which he set up as a defence, was not rendered upon a verdict, but upon a reference entered into between the garnishee and the attaching plaintiff; and it was sought to deprive him of the protection of his payment under that judgment, because it was the result of a reference; but the court held it to be as binding on him as a verdict, and, in the absence of fraud or collusion, equally a protection to him.[5]

§ 715. The importance of great care in the framing of a garnishee's answer is strikingly enforced, in connection with the

[1] Desha *v.* Baker, 3 Arkansas, 509.

[2] Ante, § 697.

[3] Parmer *v.* Ballard, 3 Stewart, 326; Tubb *v.* Madding, Minor, 129; Gildersleeve *v.* Caraway, 19 Alabama, 246; Morrison *v.* New Bedford Institution for Savings, 7 Gray, 267; Wheeler *v.* Aldrich, 13 Ibid. 51; Burton *v.* District Township, 11 Iowa, 166.

[4] Coates *v.* Roberts, 4 Rawle, 100; Seward *v.* Heflin, 20 Vermont, 144.

[5] Stille *v.* Layton, 2 Harrington, 149.

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subsequent use of the judgment against him as garnishee, as a defence to an action upon the debt in respect of which the judgment was rendered. For he cannot avail himself of such judgment, or of a payment under it, as a defence, unless it appear that the money paid was on account of the same debt for which he is sued.[1] And as the record of the recovery, including the answer of the garnishee, must be given in evidence in the action by the creditor against him who was garnishee, the latter should not fail to describe particularly in his answer the debt in respect of which he is garnished, and to state every fact within his knowledge having any bearing upon his liability; so that, afterwards, the record in the attachment suit shall exhibit all that is necessary to a successful defence against an action for the same debt. Thus, A. answered as garnishee, that he was indebted to the defendant, as executor of B., in a certain sum, but did not state the nature of the debt. Afterwards, on being sued by an assignee of a note given by his testator to the defendant, he pleaded the judgment which had been rendered against him as garnishee, and payment thereof, in bar; but the plea was held bad, on demurrer, because it did not aver that the debt in respect of which he was garnished was the same as that sued upon.[2]

A. and B. were joint makers of a note to C. A. was summoned as garnishee of C., and did not answer, but suffered judgment by default to be given against him, and paid the judgment. Afterwards A. and B. were sued on the note by C., and set up the payment of the judgment, as a payment *pro tanto;* but it was held insufficient, because in itself affording no evidence that A. was charged as garnishee on account of the note.[3]

§ 716. Where the answer of the garnishee is the basis of the judgment against him, and the matter constituting the garnishee's liability is therein set forth, the record will sufficiently establish his defence, when sued by the attachment defendant; but where there was judgment by default against the garnishee, for want of answer, he must either be deprived of his defence, because the record does not show for what liability he was charged, or be permitted to show that fact by parol proof. As it is an invariable

[1] Cornwell *v.* Hungate, 1 Indiana, 156; Sangster *v.* Butt, 17 Ibid. 354; Dirlam *v.* Wenger, 14 Missouri, 548.

[2] Harmon *v.* Birchard, 8 Blackford, 418. See Humphrey *v.* Barns, Croke, Eliz. 691.

[3] Hutchinson *v.* Eddy, 29 Maine, 91. See Dirlam *v.* Wenger, 14 Missouri, 548.

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rule that the garnishee shall not be required to pay his debt twice, there can be no doubt that he may by parol proof identify the debt for which he was charged, with that on which he is sued; and it was so held in Alabama.[1]

§ 717. Usually, as between the garnishee and the defendant in the attachment, difficulty is not likely to arise from insufficiency in the garnishee's answer; but as between the garnishee and an assignee of the debt, cases are likely to occur, in which the garnishee may, for want of fulness and explicitness in his answer, be compelled to pay his debt a second time. If at any time prior to judgment against a garnishee, he become aware of an assignment of his debt, made before the garnishment, it is his duty to bring that fact to the attention of the court, in order that, if practicable, the assignee may be cited to substantiate his claim, or that the court may withhold judgment. If the garnishee, knowing the existence of such an assignment, make no mention of it in his answer, the judgment against him will be no protection to him against an action by the assignee.[2] Thus, in a suit by an assignee in bankruptcy, in Louisiana, it was held to be no defence, that the defendant had paid the debt as garnishee of the bankrupt, when it appeared that in his answer as garnishee he made no mention of the bankruptcy of his creditor, though he knew the fact, and would not have been charged as garnishee if he had disclosed it.[3] So, where the debt of the garnishee to the defendant was evidenced by a note, the consideration of which was wages due the defendant, which could not legally be attached, and the garnishee answered, admitting the making of the note, but said nothing about the consideration, and was charged as garnishee; it was held, in an action

[1] Cook *v.* Field, 3 Alabama, 53.

[2] Prescott *v.* Hull, 17 Johns 484; Nugent *v.* Opdyke, 9 Robinson (La.), 453; Colvin *v.* Rich, 3 Porter, 175; Lamkin *v.* Phillips, 9 Ibid. 98; Foster *v.* White, Ibid. 221; Johns *v.* Field, 5 Alabama, 484; Crayton *v.* Clark, 11 Ibid. 787; Smoot *v.* Eslava, 23 Ibid. 659; Stockton *v.* Hall, Hardin, 160; Pitts *v.* Mower, 18 Maine, 361; Bunker *v.* Gilmore, 40 Ibid. 88. In Seward *v.* Heflin, 20 Vermont, 144, HALL, J., said: "I am not prepared to say, if a trustee make a full and fair disclosure of all the facts within his knowledge, and use all reasonable exertions to preserve the rights of an absent assignee, that a judgment against him shall not be a protection to him against such assignee. *But if the trustee make but a partial disclosure, so that the court have not opportunity to judge of the real merits of the case, and there be any indications of collusion between him and the creditor, the judgment should furnish him no protection whatever.*" See Marsh *v.* Davis, 24 Vermont, 363.

[3] Nugent *v.* Opdyke, 9 Robinson (La.), 453; Milliken *v.* Loring, 37 Maine, 408.

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against him on the note, by the payee, that the judgment against him was no defence, inasmuch as, if he had made known in his answer the consideration, the attachment could not have been sustained.[1]

In Alabama, the statutory practice is, where a garnishee fails to answer, to render judgment *nisi* against him, for the full amount of the plaintiff's demand; upon which judgment a *scire facias* issues against the garnishee, returnable to the next term of the court, to show cause why final judgment should not be entered against him; and upon such *scire facias* being duly executed and returned, if the garnishee fail to appear, and discover on oath, the court confirms the judgment, and awards execution for the plaintiff's whole judgment and costs. In a case under this practice, the garnishee, without waiting for the *scire facias* to issue, paid to the plaintiff the amount of the judgment *nisi*, and upon being afterwards sued by the indorsee of a promissory note he had given to the attachment defendant, pleaded that payment in bar. It appeared that the writ in the action on the note was served on the maker of the note prior to the time when he would have been required by the *scire facias* — if one had been issued — to appear and answer; but no *scire facias* was issued. The court held, that the suit on the note, in favor of the indorsee, was a notice to the maker that his note had been transferred; and that fact having been brought to his knowledge before he could have answered under the *scire facias*, and before any final judgment could have been rendered against him, it was his duty to have answered, and made known that he had received notice of the transfer of the note; and not having done so, he could not avail himself of his payment under the judgment *nisi*, as a bar to the action on the note.[2] A similar doctrine was announced in Indiana.[3]

In Mississippi, the courts have gone very far in requiring garnishees to sustain the rights of assignees. It was there held, that the garnishee, even after execution issued against him, upon learning that the debt attached in his hands had been assigned previous to the garnishment, is bound to protect himself against the execution by a bill of interpleader; and that if he fail to do so, and satisfy the judgment, it will be in his own wrong, and constitute

[1] Lock *v.* Johnson, 36 Maine, 464.

[2] Johns *v.* Field, 5 Alabama, 484. See Colvin *v.* Rich, 3 Porter, 175; Foster *v.* White, 9 Ibid. 221; Kimbrough *v.* Davis, 34 Alabama, 583.

[3] Smith *v.* Blatchford 2 Indiana 184.

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no valid defence to the claim of the assignee.[1] But afterwards, when one against whom judgment had been rendered as garnishee, and also as defendant in a suit by the assignee of the debt, filed a bill of interpleader against both the plaintiffs, *the same court held, that it would not lie, and left the party to pay his debt twice.*[2]

§ 718. In connection with this subject it may be mentioned, that it is the duty, not less than the interest, of an assignee of a *chose in action*, to put it in the power of the maker, to disclose its assignment, in any answer he may have to give as garnishee of the assignor, by notifying him, and exhibiting to him the evidence thereof, that he may be able to state the whole matter to the court. It is not to be considered that, in all cases, a failure on the part of the assignee to exhibit to the maker such evidence will defeat or seriously prejudice his claim; but in any system of practice where the garnishee's liability turns altogether on the terms of his answer, and where the effect given to a statement by him of an assignment of the *chose in action*, in respect of which it is sought to charge him, depends, as in Massachusetts, upon the evidence which the answer affords of the existence and legal efficacy of such assignment, it is indispensable that the assignee should produce to the garnishee such evidence of his title as will justify the garnishee in setting out the assignment as an existing fact, and as will support the assignment against the attaching creditor.[3] Therefore, where A. gave an unnegotiable note to B., and was afterwards summoned as garnishee of B.; and in his answer disclosed that, since the service of the writ, C. had informed him that the note was his property, and that B. acted as his agent in taking it, but exhibited no evidence of his property in the note; and A. in his answer did not state his belief that C.'s statement was true, or that the note was C.'s, and he was thereupon charged as garnishee, and satisfied the judgment, and afterwards was sued by C. on the debt; it was held, that the judgment against A., as garnishee, was a good defence to the action; the main ground assumed, being that C. had failed to exhibit such evidence of his title as would authorize A. to express his belief in its existence and validity.[4]

[1] Oldham *v.* Ledbetter, 1 Howard (Mi.), 43.
[2] Yarborough *v.* Thompson, 3 Smedes & Marshall, 291.
[3] Wood *v.* Partridge, 11 Mass. 488; McAllister *v.* Brooks, 22 Maine, 80.
[4] Wentworth *v.* Weymouth, 11 Maine, 446.

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§ 719. It is still more important that notice of the transfer of a note should be given to the maker, where, as in some States, such transfer takes effect, as regards him, only from the time of such notice; for, if previous to notice the maker be subjected to garnishment as a debtor of the payee, and compelled to pay the amount of the note, the assignee cannot afterwards maintain an action against him. Thus, in Massachusetts, in a suit brought there by the indorsee against the maker of a promissory note, given in Connecticut, by one citizen of that State to another, and there indorsed to a citizen of Massachusetts, — which note was not negotiable by the law of Connecticut; it was held to be a good defence, that the maker, before he had notice of the indorsement, had been summoned as garnishee of the payee, and had paid the amount of the note on an execution issued against him as garnishee.[1]

§ 720. In pleading a recovery against the maker of a note, as garnishee of the payee, it is not necessary that the plea should aver, *in totidem verbis*, that the maker had no notice of the transfer of the note, before he answered the garnishment. If he had notice, the plaintiff should reply the fact and establish it.[2]

§ 721. If the garnishment of the maker of a note, and judgment against him, and satisfaction of the judgment, before he has notice of its transfer, would be held to bar the right of the holder to recover against the maker, much more will his right be barred where he takes the note with express notice of the pendency of the garnishment.[3]

§ 722. In *assumpsit*, the recovery and execution in the attachment may either be pleaded specially or given in evidence under the general issue;[4] but in debt on bond it must be pleaded. Care must be taken to plead it properly, for if the defendant fail for want of a proper plea, it is said that the party must pay the money over again, and has no remedy either in law or equity.[5]

[1] Warren *v.* Copelin, 4 Metcalf, 594. [2] Mills *v.* Stewart, 12 Alabama, 90.
[3] Glanton *v.* Griggs, 5 Georgia, 424.
[4] Cook *v.* Field, 3 Alabama, 53.
[5] Turbill's Case, 1 Saunders, 67, Note 1; Coates *v.* Roberts, 4 Rawle, 100.

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§ 723. Neither in giving an attachment in evidence under the general issue, nor in pleading it, is the defendant bound to prove that the plaintiff in the attachment had a sufficient cause of action. For it would oftentimes defeat the whole effect of the attachment laws, if the garnishee should, without the means of proving it, be held to such proof.[1] This, however, is held only in cases where the attachment is laid in the hands of third persons; not where the party attaches money in his own hands. In that case, when sued for the debt, the plaintiff may reply that he was not indebted to the defendant, and the defendant will be held to prove the debt.[2]

[1] M'Daniel *v.* Hughes, 3 East, 367; Morris *v.* Ludlam, 2 H. Black. 362.

[2] Sergeant on Attachment, 2d Edition, 166; Paramore *v.* Pain, Cro. Eliz. 598; M'Daniel *v.* Hughes, 3 East, 367; Morris *v.* Ludlam, 2 H. Black. 362.

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CHAPTER XXXIX.

ACTION FOR MALICIOUS ATTACHMENT.

§ 724. In the chapter on Attachment Bonds,[1] we considered the responsibility of an attachment plaintiff to the defendant, for an attachment which was merely wrongful, and not obtained maliciously and without probable cause. We now proceed to an examination of the recourse of the defendant, upon common law principles, for an attachment maliciously sued out.

§ 725. Whether an attachment was wrongfully sued out, cannot be made the subject of inquiry between the parties thereto, except in the attachment suit itself, or in an action brought by the defendant therein against the plaintiff for the wrong. Hence where one whose property had been attached and sold, brought trover for the value thereof against the attaching plaintiff, and it appeared that the attachment was issued conformably to statute, it was held, that it could not be impeached in a collateral way in such an action, on the ground that it was wrongfully sued out.[2]

§ 726. It has been uniformly held in this country, that an attachment plaintiff may be subjected to damages for attaching the defendant's property maliciously and without probable cause. The defendant's remedy in this respect is not at all interfered with by the plaintiff's having, at the institution of the suit, given a bond, with security, conditioned to pay all damages the defendant might sustain by reason of the attachment having been wrongfully obtained;[3] nor is he considered as precluded from maintaining his action for damages because he consented to the dismissal of the attachment suit.[4] But, in the absence of any statute

[1] Ante, Ch. VI.

[2] Rogers v. Pitman, 2 Jones, 56.

[3] Sanders v. Hughes, 2 Brevard, 495; Donnell v. Jones, 13 Alabama, 490; Smith v. Story, 4 Humphreys, 169; Pettit v. Mercer, 8 B. Monroe, 51; Senecal v. Smith, 9 Robinson (La.), 418.

[4] Spaulding v. Wallett 10 Louisiana Annual, 105.

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conferring the right, the defendant cannot maintain an action against the plaintiff for the mere wrongful suing out of the attachment. Such an action, as we have seen, may be maintained on the attachment bond;[1] but, on common law principles, the element of malice is indispensable to authorize an action on the case.[2]

§ 727. This action cannot be maintained against an attachment plaintiff, on account of an attachment maliciously obtained without his knowledge, by an attorney at law employed by him to collect a debt;[3] but the attorney is liable in such case; and where he and his client act in concert they are both liable.[4]

§ 728. It is no obstacle to the institution and maintenance of this action, that the attachment was obtained in a court within a foreign jurisdiction. The question is, not where the attachment issued, but whether it was justifiable. If issued in a foreign State, the forms of the proceeding must be tested by the laws of that State; but if valid, in form, under those laws, the question still remains, whether the plaintiff perverted those forms to the purpose of oppression; and this is for the determination of the court, domestic or foreign, in which it may arise.[5]

§ 729. The defendant's action is governed by the principles of the common law applicable to actions for malicious prosecution. Case, therefore, and not trespass *vi et armis*, is the proper action for enforcing this liability.[6] It cannot be brought until the attach-

[1] Ante, Ch. VI.

[2] McKellar *v.* Couch, 34 Alabama, 336.

[3] Kirksey *v.* Jones, 7 Alabama, 622.

[4] Wood *v.* Weir, 5 B. Monroe, 544.

[5] Wiley *v.* Traiwick, 14 Texas, 662.

[6] Shaver *v.* White, 6 Munford, 110; Ivy *v.* Barnhartt, 10 Missouri, 151. In Lovier *v.* Gilpin, 6 Dana, 321, the Court of Appeals of Kentucky said: "In trespass the force is the gist of the action, and if that be justified by the process, the motive of the party, either in setting it on foot, or in directing its execution, is immaterial, whatever may have been the consequential injury; nor can the efficacy or inefficacy of the process to justify the force committed under its mandate depend, in any degree, upon the motive with which it was issued or executed. However, therefore, the proof or imputation of malice might justly operate to enhance the damages, even in an action of trespass, when the right to sue for the force itself is established, it gives no aid whatever in establishing that right. And it would seem that the very necessity (if there be such necessity) of resorting to the existence of malice as a ground of the action, is so far an evidence that the action is not sustainable simply for the force; and therefore, that *case*, which is founded upon the existence of malice and the want of probable cause for the injurious

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ment suit shall have terminated; but an omission to aver in the declaration its termination, is cured by verdict.[1]

§ 730. It is not sufficient to aver that the defendant caused and procured an attachment to be wrongfully and maliciously and without probable cause sued out against the plaintiff, and that the writ was placed in the hands of a sheriff, and was by him executed. The defendant must be connected by averment with the execution of the process, by delivering the writ to the officer, or participating in his proceedings.[2]

§ 730 *a*. In such an action, before the defendant can be called upon to sustain the truth of the affidavit upon which the attachment was issued, the plaintiff must give some evidence of its falsity, or of circumstances from which the jury could infer its falsity. His right to recover depends on the vexatious use of the

proceeding, is the more appropriate remedy. It is laid down by Chitty that 'no person who acts upon a regular writ, or warrant, can be liable to the action of trespass, however malicious his conduct; but case, for the malicious motive and want of probable cause for the proceeding, is the only sustainable form of action'; and for this doctrine he cites several adjudged cases. In the case of Owens *v.* Starr, 2 Littell, 234, the same principle in effect is announced by this court, and is declared to be applicable to an attachment issued by a justice of the peace under our statute, — for the abuse of which process, as is there said, the party injured must resort to an action on the case. That was an action of trespass against the party who had procured the attachment, and it appeared that he was present (as in this case), aiding the officer in levying it on the plaintiff's goods. It was decided that, as the attachment, though voidable, was not void, it formed a justification, and might defeat the action of trespass. In the same case, the court lays down the principle, 'that for property taken, or a person arrested, under process of law, an action of trespass cannot be maintained,' unless it be 'where the process is wholly irregular or void, or has been set aside or annulled, or has issued from a court or tribunal not having competent jurisdiction, or where the process has been levied or executed on the goods or person of a stranger.' We have seen no adjudged case nor elementary treatise, in which this list of exceptions has been extended, and the principle, subject to the exceptions stated, is abundantly supported by authority. Assuming, then, that a valid attachment stands upon the same footing as any other legal process, with respect to the protection which it affords to those engaged in the execution of its mandate, and that the force necessarily employed for that purpose is not, in itself, the ground of an action of trespass against the officer or his assistants by whom it is levied, or the party by whom it is sued out; it follows that, if this attachment was issued by a tribunal having competent authority, the plaintiff cannot maintain trespass for the seizure and asportation of his property under it, unless it was either irregular or void, or unless it had been set aside and annulled."

[1] Rea *v.* Lewis, Minor, 382; Nolle *v.* Thompson, 3 Metcalfe (Ky.), 121; Feazle *v.* Simpson, 2 Illinois (1 Scammon), 30. In Fortman *v.* Rottier, 8 Ohio State, 548, it was held, that this is not necessary, where the trial and judgment in the attachment suit do not necessarily involve the question of the existence of probable cause.

[2] Marshall *v.* Betner, 17 Alabama, 832.

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process; and to make this out, the *onus* is, in the first instance, on him.[1]

§ 731. In such an action a return of the sheriff on the attachment, "*not executed by order of the plaintiff*," does not disprove the fact that an attachment was made. Though given in evidence by the plaintiff, he may contradict it, and show by parol proof that the writ was executed.[2]

§ 732. The earliest adjudication concerning this action in this country, with which we have met, was in Virginia, in 1803, when it was decided that no action could be sustained, unless it appeared that the plaintiff, in attaching the defendant's property, acted maliciously and without probable cause; and that it was not sufficient for the declaration to aver that the attachment was "without any *legal* or *justifiable* cause"; but it must allege the want of *probable* cause.[3] This doctrine has since been recognized and affirmed in Massachusetts, Connecticut, New Jersey, Pennsylvania, Ohio, Tennessee, Kentucky, North Carolina, Georgia, Louisiana, and Texas.[4] In Virginia, however, in 1859, it was held, that under the broad and comprehensive terms of the statute of jeofails of that State, adopted after the first ruling on this subject, as just stated, a declaration charging that the attachment was sued out "wrongfully and without good cause," was good after verdict;

[1] O'Grady *v.* Julian, 34 Alabama, 88. See Burrows *v.* Lehndorff, 8 Iowa, 96.

[2] Mott *v.* Smith, 2 Cranch, C. C. 33.

[3] Young *v.* Gregorie, 3 Call, 446.

[4] Linsay *v.* Larned, 17 Mass. 190; Wills *v.* Noyes, 12 Pick. 324; Ives *v.* Bartholomew, 9 Conn. 309; Boon *v.* Maul, Pennington, 2d Ed. 631; M'Cullough *v.* Grishobber, 4 Watts & Sergeant, 201; Tomlinson *v.* Warner, 9 Ohio, 103; Smith *v.* Story, 4 Humphreys, 169; Williams *v.* Hunter, 3 Hawks, 545; Senecal *v.* Smith, 9 Robinson (La), 418; Wiley *v.* Traiwick, 14 Texas, 662; Sledge *v.* McLaren, 29 Georgia, 64; Accessory Transit Co. *v.* McCerren, 13 Louisiana Annual, 214; Mitchell *v.* Mattingly, 1 Metcalfe (Ky.), 237. In Wood *v.* Weir, 5 B. Monroe, 544, the Court of Appeals of Kentucky thus state the doctrine applicable to actions for malicious suit: "To maintain an action for a malicious suit, as well as for a malicious prosecution, three things are necessary to be made out by the plaintiff: 1. A want of probable cause; 2. Malice in the defendant; and 3. Damage to the plaintiff. Malice may be implied from the want of probable cause, but this implication may be explained and repelled by facts and circumstances indicating a fair and legitimate purpose and honest pursuit of a claim believed to be just. So, though there be probable cause, and even just grounds for the suit, if, from bad intentions or malicious motives, an illegal, oppressive, and vexatious order is procured, by the attorney or client, or both, without probable cause or excuse, by which damage is done to the defendant, an action will lie against them both. And malice may be implied from the want of probable excuse, or grounds for the order, which may be explained away or repelled by counteracting circumstances."

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because proof that it was sued out maliciously and without probable cause, would be entirely consistent with the allegation as laid; and it might well be that the same testimony relied on to establish the latter would furnish sufficient proof of the former.[1]

§ 732 *a*. The essential ground is, that the proceedings complained of were had without probable cause; inasmuch as, from the want of such cause, the other main ingredient, malice, may be, and most commonly is, implied; while from the proof of even *express* malice the want of probable cause cannot be inferred. It is, therefore, important to determine what is probable cause. It is not referable to the state of facts actually existing when the attachment suit was brought, without regard to whether the plaintiff therein knew of those facts, and based his proceedings upon them; for, in the language of the Court of Appeals of Virginia, that "would be in effect to allow a party sued for a malicious prosecution to say to the plaintiff, by way of defence, 'It is true you are innocent of the offence with which you were charged, and at the time of instituting the prosecution I knew of no circumstances to justify me in believing you to be guilty, and did not so believe; but I have since ascertained that there existed at the time certain facts and circumstances, which, had they been then known to me, would have warranted me in believing you guilty.'" Probable cause is, therefore, to be referred to the justifiable belief of the party, based on a knowledge, at the time, of facts and circumstances justifying that belief; or, in other words, it is, substantially, belief founded on reasonable grounds.[2]

§ 733. The malice necessary to support this action is any improper motive. It need not imply malignity, nor even corruption, in the appropriate sense of those terms. That which is done contrary to one's own conviction of duty, or with a wilful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, or to do a wrong and unlawful act, knowing it to be such, constitutes legal malice.[3] If, for instance, a person commence an action by attaching the goods of the defendant, knowing that he has no cause

[1] Spengler *v.* Davy, 15 Grattan, 381.
[2] Spengler *v.* Davy, 15 Grattan, 381.
[3] Wills *v.* Noyes, 12 Pick. 324.

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of action, he is considered to have intended to vex, harass, and injure him; and this is sufficient evidence of malice.[1] So, though he have a cause of action, if he allege, as a ground for obtaining the attachment, that which he knows to be false, it is express malice.[2]

§ 734. In Massachusetts, it is held, that the action cannot be sustained, unless the evidence be satisfactory that the plaintiff *knew*, when he commenced his action by attachment, that he had no cause of action, and that he acted maliciously in that behalf. Therefore, where the declaration alleged that the attachment plaintiff knew he had no lawful cause of action against the defendant when the action by attachment was commenced, and that he acted maliciously in commencing it without any just cause, and also in attaching and detaining plaintiff's property; it was held, that the declaration was not supported by evidence that he had attached the property under a belief that he had a good cause of action, and then maliciously detained it after he had learned that the suit was groundless.[3]

§ 735. In New Jersey, it was held, that an action for malicious attachment would lie, where the attachment was sued out of a court having no jurisdiction; and that in the declaration it was not necessary to aver that the defendant *knew* that the court had not jurisdiction. And in that case the court refused to allow the cause of action for which the attachment was obtained to be shown in evidence.[4]

§ 736. The doctrine intimated in the last-cited case in Massachusetts, that the plaintiff's *belief* of his having a cause of action, will protect him from an action for malicious prosecution, has been distinctly recognized and announced in other States, in relation to the grounds on which the attachment is sued out, as distinct from the question of the existence of a cause of action. In North Carolina, it was decided that the plaintiff's belief, caused by the defendant's conduct, that the defendant, as alleged in the affidavit, had absconded, was sufficient to protect the plaintiff from this action, although in fact the defendant had not ab-

[1] Ives *v.* Bartholomew, 9 Conn. 309.
[2] Tomlinson *v.* Warner, 9 Ohio, 103.
[3] Stone *v.* Swift, 4 Pick. 389.
[4] Boon *v.* Maul, Pennington, 2d Ed. 631.

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sconded.[1] So, in Pennsylvania, in a similar case, it was held, that the question was not whether the attachment defendant had really absconded, but whether his conduct was such as to justify the plaintiff's apprehensions, and to make recourse to the attachment a measure of reasonable precaution.[2] So, in Tennessee, where the plaintiff sued out an attachment on the ground that the defendant was a non-resident of the State, when it appeared that, though he had been two years absent from the State, and had avowed his intention to remove, yet he had not in fact changed his domicile; and the attachment was dismissed; and the defendant brought his action against the plaintiff for damages; it was held, that a recovery could not be had merely on the ground that the attachment had been obtained when it ought not to have been, but that the probable cause given by the defendant must be taken into consideration as a defence.[3]

§ 737. But though the plaintiff's belief may protect him from an action for malicious prosecution, the question still arises, as to what will justify such a belief. In reference to the cause of action it may be easy to show the grounds of the belief; but perhaps not so, in regard to the special ground laid for obtaining the attachment. In such case it has been considered, that mere representations made to the plaintiff by third parties, that the defendant was about to abscond, without any evidence that the charge was true, or that the plaintiff had any reason to believe it true, or made any inquiry into the matter, were no ground of defence to him when sued for malicious prosecution.[4]

§ 738. In Alabama, where, as we have seen,[5] actual damage for a merely wrongful attachment may be recovered, when no malice existed or is averred, the plaintiff's belief of the existence of a cause of action, or of facts authorizing the issue of an attachment, may be given in evidence to repel the presumption of malice, and thereby prevent the recovery of exemplary or vindictive damages.[6] And so, in Louisiana, it was considered that if it was apparent

[1] Williams *v.* Hunter, 3 Hawks, 545.
[2] M'Cullough *v.* Grishobber, 4 Watts & Sergeant, 201.
[3] Smith *v.* Story, 4 Humphreys, 169.
[4] Schrimpf *v.* McArdle, 13 Texas, 368.
[5] Ante, § 157.
[6] Donnell *v.* Jones, 13 Alabama, 490; White *v.* Wyley, 17 Ibid. 167.

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that the plaintiff in the attachment had a sufficient or very probable cause of action, and was prevented from gaining a judgment by some technical objection, or irregularity in the proceedings, which could not be foreseen, the probability and justice of the demand might be pleaded, and given in evidence in mitigation of a claim for vindictive damages.[1]

These cases are equivalent to a recognition of the common law principle we have been considering; for it is admitted that the plaintiff's belief, on proper grounds, would be sufficient to protect him from a recovery of those damages which, but for peculiar statutes, would be authorized by the common law, and could be recovered only on common law grounds.

§ 739. In the cases cited, in which the probable cause for the attachment is inquired into as a bar to the action, it will be found that no opportunity existed to investigate and determine that point in the attachment suit. Where, as in some States, the attachment defendant may preliminarily controvert and disprove the truth of the affidavit on which the attachment issued, that point could not properly become the subject of investigation in the action for malicious prosecution. For if the truth of the affidavit was tried in the attachment suit, and determined against the plaintiff there, the matter would be *res adjudicata*, and of course he could not, when sued by the defendant, set up the truth of the affidavit as a defence.[2] On the other hand, the attachment defendant, if the affidavit should have been found to be true, would be equally precluded, in the action for malicious prosecution, from contesting that point; or if he failed to put it in issue in the attachment suit, it would be an admission of the allegation in the affidavit, which he could not afterwards retract or deny.

§ 740. But even where this course may be pursued, it has been held, that an appearance to the attachment, entering special bail, and confessing judgment for only *a part* of the sum demanded, is not a waiver of the injury; for, said the court, "the defendant had no alternative but to enter special bail or see his property sacrificed for what was in fact not due. An appearance thus extorted, is surely not an admission that the means employed were

[1] Cox v. Robinson, 2 Robinson (La.), 313. [2] Hayden v. Sample, 10 Missouri, 215.

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legal; and a creditor cannot compel the payment, even of a just debt, by illegal means."[1]

§ 741. In a suit for wrongfully and vexatiously suing out an attachment, on the ground of an intended departure of the debtor from the State, it is not admissible for the defendant to give in evidence, as proof of probable cause, declarations of the debtor made a few days before the issue of the attachment, which, when it was issued, had not come to the knowledge of the attachment plaintiff. Declarations accompanying an act of a party, from which act an inference is sought to be drawn prejudicial to him, are admissible in evidence, as characterizing the act, and as explanatory of the intention with which it was done. But to form a part of the *res gestæ*, such declarations must be made at the time the act they are supposed to characterize was done, and must be calculated to elucidate and unfold the nature and quality of the facts they were intended to explain, and so to harmonize with those facts as obviously to constitute one transaction. Declarations not of this character, whether made before or after the act with which it is sought to connect them, are not part of the *res gestæ*, but independent facts, and are not admissible in evidence.[2]

§ 742. In such a case as that stated in the previous section, it is equally inadmissible for the plaintiff to rebut the evidence of probable cause, by proof that it was generally reputed in the neighborhood in which he lived that he was going abroad on a temporary visit and would shortly return.[3]

§ 743. It has been decided in Alabama, that the attachment plaintiff, when sued for malicious prosecution, is not confined, in his defence, to showing that the facts on which he sued out the attachment existed and amounted to a probable cause; but he may show that other causes existed, for which, under the statute, the attachment might have issued. For instance, where the ground on which the attachment was obtained was, that the defendant was about to dispose of his property fraudulently, with intent to avoid the payment of the debt sued for; it was held, in the action for malicious prosecution, that the question was, not

[1] Foster *v.* Sweeny, 14 Sergeant & Rawle, 386.
[2] Havis *v.* Taylor, 13 Alabama, 324.
[3] Havis *v.* Taylor, 13 Alabama, 324; Pitts *v.* Burroughs, 6 Ibid. 733.

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whether the precise ground stated in the affidavit was true, but whether the attachment was wrongfully or vexatiously sued out; and that it was a complete defence, if the attachment plaintiff could show that any one of the causes existed which would have warranted him in resorting to the process; for instance, that the defendant was about to remove his property out of the State, with intent to avoid the payment of the debt upon which the attachment was founded.[1] In the same State, it was also intimated, that it might be shown to the jury, to repel the presumption of malice, that the plaintiff was indebted to the defendant in another State, and ran away from there with his property to avoid the payment of his debts.[2] And it was there held, that the insolvency of the attachment defendant, though constituting no bar to an action brought by him against the plaintiff for maliciously suing out the attachment, was proper to be given in evidence, as a circumstance to be considered by the jury in ascertaining the damages he had sustained by his credit being injured.[3] And the Supreme Court of that State decided, that while it was inadmissible for the defendant to prove that, when he sued out his attachment, there was another attachment in the hands of the sheriff against the same party, yet he might prove that another attachment had been issued, and his knowledge of that fact, previous to the issuing of his attachment, as tending to rebut the presumption of malice in him.[4] And so he may show in evidence, that the attachment was taken out under advice of counsel; which is good to rebut the idea of malice, but not as a justification.[5]

§ 744. When, in the attachment suit, the plaintiff shall have recovered judgment, it is, until reversed, conclusive of probable cause, so far as indebtedness enters into that question; and in the action for malicious attachment there can be no re-examination of that point.[6] Not so, however, when the judgment in the attachment suit shall have been for the defendant. There, the attachment plaintiff, when sued for malicious attachment, may, in order to show probable cause, give evidence to prove that there

[1] Kirksey *v.* Jones, 7 Alabama, 622.
[2] Melton *v.* Troutman, 15 Alabama, 535
[3] Donnell *v.* Jones, 13 Alabama, 490. See Mayfield *v.* Cotton, 21 Texas, 1.
[4] Yarbrough *v.* Hudson, 19 Alabama, 653; Goldsmith *v.* Picard, 27 Ibid. 142.
[5] Raver *v.* Webster, 3 Iowa, 502.
[6] Jones *v.* Kirksey, 10 Alabama, 839.

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was a debt, though he failed to recover on it. The question is not whether a demand shall be recovered, upon which a jury has before passed, and the court, upon their verdict, has considered ought not to be recovered; but whether the attachment plaintiff had probable cause for instituting the proceeding, and if he had not, whether he was influenced by malice. Any evidence, then, which goes to establish the existence of the demand at the time the attachment was issued, tends to prove probable cause, and to rebut the presumption of malice which would arise from the discharge of the defendant in the attachment suit.[1]

§ 745. The rules as to damages, applicable in other cases of malicious prosecution, apply to actions for malicious attachment. Those rules are thus expressed by Mr. Greenleaf: "Whether the plaintiff has been prosecuted by indictment, or by civil proceedings, the principle of awarding damages is the same; and he is entitled to indemnity for the peril occasioned him in regard to his life and liberty, for the injury to his reputation, his feelings, and his person, and for all the expenses to which he necessarily has been subjected. And if no evidence is given of particular damages, yet the jury are not therefore obliged to find nominal damages only. Where the prosecution was by suit at common law, no damages will be given for the ordinary taxable costs, if they were recovered in that action; but if there was a malicious arrest, or the suit was malicious, and without probable cause, the extraordinary costs, as between attorney and client, as well as all other expenses necessarily incurred in defence, are to be taken into the estimate of damages."[2]

In Alabama it was held, that fees paid to counsel for defending the original suit, if reasonable and necessarily incurred, might be proven and taken into consideration by the jury in the assessment of damages;[3] and that injuries to the credit and business of a merchant, resulting from taking out an attachment against him on the ground of fraud, might legitimately be averred and proved.[4] But where, in such a case, a witness was asked "what was the usual profit made by such establishments in the neighborhood of

[1] Marshall v. Betner, 17 Alabama, 832. See Gaddis v. Lord, 10 Iowa, 141.
[2] 2 Greenleaf on Evidence, § 456.
[3] Marshall v. Betner, 17 Alabama, 832.
[4] Goldsmith v. Picard, 27 Alabama, 142; O'Grady v. Julian, 34 Ibid. 88.

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the plaintiff in the same kind of business," the question was held inadmissible, because such testimony could furnish no reliable data for determining the loss sustained by the plaintiff; while its tendency was to multiply the issues before the jury almost indefinitely.[1]

[1] O'Grady *v.* Julian, 34 Alabama, 88.

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APPENDIX.

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APPENDIX.

THE LEADING STATUTORY PROVISIONS OF THE SEVERAL STATES AND TERRITORIES OF THE UNITED STATES, IN RELATION TO SUITS BY ATTACHMENT.

ALABAMA.

ATTACHMENTS may issue: 1. To enforce the collection of a debt, whether it be due or not, at the time the attachment is taken out: 2. For any moneyed demand, the amount of which can be certainly ascertained: 3. To recover damages for a breach of contract, when the damages are not certain or liquidated: 4. When the action sounds in damages merely.

The following are the grounds of attachment: —

1. When the defendant resides out of the State.

2. When the defendant absconds.

3. When the defendant secretes himself so that the ordinary process of law cannot be served on him.

4. When the defendant is about to remove out of the State.

5. When the defendant is about to remove his property out of the State, so that the plaintiff will probably lose his debt, or have to sue for it in another State.

6. When the defendant is about fraudulently to dispose of his property.

7. When the defendant has fraudulently disposed of his property.

8. When the defendant has moneys, property, or effects, liable to satisfy his debts, which he fraudulently withholds.

For causes of action specified under the first two heads above stated, an attachment may be issued by any judge of the Circuit Court, returnable to any county in the State, or by the clerk of the Circuit Court, judge of the Probate Court, or any justice of the peace, within their respective counties. In cases under those heads, the officer, before issuing the attachment, must require the plaintiff, his agent or attorney, to make in writing and subscribe an oath of the amount of the debt or demand, and that it is justly due; also, that one of the grounds of attachment above specified exists, and that the attachment is not sued out for the purpose of vexing or harassing the defendant. He must further require the plaintiff, his agent or attorney,

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to execute a bond in double the amount claimed to be due, with sufficient surety, payable to the defendant, with condition that the plaintiff will prosecute the attachment to effect, and pay the defendant all such damages as he may sustain from the wrongful or vexatious suing out of the attachment.

For causes of action specified under the third and fourth heads above stated, the attachment can be issued only by a judge of the Circuit Court or chancellor, returnable to any county. When an attachment is applied for in those cases, the judge or chancellor, before issuing it, must require the plaintiff, his agent or attorney, in addition to the affidavit and bond required in other cases, to make affidavit in writing of the special facts and circumstances, so as to enable him to determine the amount for which a levy must be made; which sum may, at the discretion of the court, be reduced, at the return term of the attachment, on affidavit of the defendant, and the levy released to the amount of such reduction.

A non-resident may obtain an attachment against a non-resident for an existing debt, or ascertained liability; but the plaintiff, his agent or attorney, must, in addition to the oath necessary in other cases, swear that according to the best of his knowledge, information, and belief, the defendant has not sufficient property within the State of his residence, wherefrom to satisfy the debt; and must also give bond as in other cases, with surety resident in this State.

Corporations, either foreign or domestic, may sue or be sued by attachment.

Attachments may be executed on real and personal property, and by summoning garnishees.

The garnishee is liable for indebtedness, to the defendant, and for personal and real property and choses in action, belonging to the defendant.

An attachment may be levied on the joint and separate estate of joint obligors, promisors, or partners, whether resident or non-resident.

Executors and administrators may be garnished for a debt due by the testator or intestate to the defendant; and for debts due to legatees or distributees; but no judgment can be rendered against them on account of the latter, until a settlement of the estate, unless they assent to the legacy, or admit assets to pay the amount claimed, or some portion thereof, out of the distributive share of the debtor.

Money in the hands of an attorney at law, sheriff, or trustee, may be attached; as also may a debt in suit.[1]

ARKANSAS.

To obtain an attachment, the creditor must file with his declaration an affidavit, of himself or some other person for him, stating that the defend-

[1] Code of Alabama of 1852, Title 2, Ch. I.

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ant is justly indebted to the plaintiff in a sum stated, and also that the defendant is not a resident of the State, or that he is about to remove out of the State, or that he is about to remove his goods and effects out of the State, or that he so secretes himself that the ordinary process of law cannot be served on him; and shall also file a bond to the defendant, with sufficient security, to be approved by the clerk, in double the amount of his claim as sworn to, conditioned that he will prove his debt or demand on a trial at law, or that he will pay such damages as shall be adjudged against him.

The writ authorizes the attachment of the defendant by all and singular his goods and chattels, lands and tenements, credits and effects; and under it any person in whose hands or possession are any such lands, tenements, goods, chattels, moneys, credits, or effects of the defendant, may be summoned as garnishee, and may be required to answer allegations and interrogatories exhibited against him. His answer may be denied by the plaintiff, and a trial of the truth thereof be had.[2]

CALIFORNIA.

Creditors may proceed by attachment.

Before an attachment shall be issued, the plaintiff, his agent or attorney, shall take and subscribe an affidavit that the defendant is indebted to the plaintiff in the sum of two hundred dollars or over, specifying the amount as near as may be, over and above all legal set-offs, and that the sum is due upon contract, express or implied, and that the deponent knows, or has good reason to believe, either: —

1. That the defendant has absconded, or is about to abscond from this State, or that he is concealed therein to the injury of his creditors; or,

2. That the defendant has removed, or is about to remove any of his property out of this State, with intent to defraud his creditors; or,

3. That he fraudulently contracted the debt, or incurred the obligation, respecting which the suit is brought; or,

4. That the defendant is a non-resident of this State; or,

5. That the defendant has fraudulently conveyed, disposed of, or concealed his property, or a part of it, or is about fraudulently to convey, dispose of, or conceal the same, or a part of it, with intent to defraud his creditors.

Before an attachment can issue, the plaintiff, or some responsible person in his behalf, shall execute a bond with sufficient surety, in a sum at least double the amount of the demand sworn to, payable to the defendant, and conditioned that the plaintiff shall pay to the defendant all damages that he may incur by reason of the wrongful suing out of the writ.

Pending the action, the court, upon being satisfied of the insufficiency

[2] English's Digest of Statutes of Arkansas, 171 – 183.

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of the bond, may require another bond, and such further surety as shall be necessary.

The writ shall command the sheriff to attach so much of the lands, tenements, goods, chattels, moneys, and effects of the defendant, not exempt from execution, wheresoever the same may be found within the county, as will be sufficient to satisfy the plaintiff's demand.

Real estate shall be bound, and the attachment shall be a lien thereon, from the time when a certified copy of the attachment, with a description of such real estate, shall be deposited in the recorder's office of the county where it is situated; and the recorder shall note on the writ the day, hour, and minute when he received it.

Attachment may issue, although the debt or demand of the plaintiff be not due, when it is shown by the affidavit: 1st. That the defendant is about to abscond from the State, or that he is concealed therein, to the injury of his creditors: or, 2d. That he is about to remove any of his property out of the State, or that he is about fraudulently to convey, dispose of, or conceal the same, with intent to defraud his creditors. In such case no judgment shall be rendered until the debt becomes due, but the attachment shall give a lien as in other cases.

If the plaintiff, or any one in his behalf, make affidavit, stating that he verily believes that any person (naming him) has money, property, credits, or effects in his possession belonging to the defendant, or is indebted to the defendant, and deliver the affidavit to the officer having the writ, the officer, if he cannot attach such property and get possession thereof, shall serve the writ and affidavit upon such person, by giving him a copy thereof with a written notice to appear in court at the return of the writ. From the day of such service, the person so notified as garnishee shall stand liable to the plaintiff in attachment, to the amount of the property, moneys, and credits in his hands, and debts due, or to become due, from him to the defendant, and shall attend the court in accordance with the notice, and answer under oath all questions put to him touching the property, credits, and effects of the defendant in the garnishee's possession, or within his knowledge, and as to all debts then due, or to become due from him to the defendant.

If the answer of the garnishee be not satisfactory to the plaintiff, an issue shall be made up between the plaintiff and the garnishee, and tried as in other actions.[1]

COLORADO.

An attachment issues, upon any creditor, his agent or attorney, filing an affidavit and bond in the office of the clerk of the District Court.

The affidavit must state that the defendant is indebted to such creditor

[1] Laws of California, 1849-50, pp. 412-416.

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in a sum exceeding twenty dollars, stating the nature and amount of such indebtedness, as near as may be, and that the debtor

1. Has departed, or is about to depart from this State, with the intention of having his effects removed therefrom; or,

2. Is about to remove his property from this State, to the injury of such creditor; or,

3. Conceals himself, or stands in defiance of an officer, so that process cannot be served upon him; or,

4. Is not a resident of this State; or,

5. Is converting, or is about to convert, his property into money, or otherwise dispose thereof, with the intent of placing it beyond the reach of such creditor.

The bond, with security, must be in double the sum sworn to be due, conditioned for the satisfying of all costs which may be awarded to the defendant, or to any others interested in the proceedings, and all damages which shall be recovered against the plaintiff for wrongfully suing out the attachment.

Under the writ, lands, tenements, goods, chattels, rights, credits, moneys, and effects of the debtor may be attached.

When the officer is unable to find property of the defendant, sufficient to satisfy the writ, he must summon all persons within his county, whom the creditor shall designate as having any property, effects, or choses in action in their possession or power, belonging to the defendant, or who are in any wise indebted to the defendant, to appear and answer as garnishees.[1]

CONNECTICUT.

The process in civil actions in this State is by summons or attachment.

Attachment may be granted against the goods and chattels of the defendant, and for want thereof, against his lands, or against his person, when not exempted from imprisonment on the execution in the suit.

When the plaintiff prays out an attachment, a sufficient bond must be given, conditioned to prosecute his action to effect, and answer all damages in case he make not his plea good.

Whenever the goods or effects of a debtor are concealed in the hands of his attorney, agent, factor, or trustee, so that they cannot be found to be attached, or where debts are due from any person to a debtor, any creditor may bring his action against such debtor, and insert in his writ a direction to the officer to leave a true and attested copy thereof, at least fourteen days before the session of the court to which it is returnable, with such debtor's attorney, agent, factor, trustee, or debtor, or at the place of his or their usual abode, and it shall be the duty of the officer serving such writ to leave a copy thereof according to such direction; and from the time

[1] Laws of Colorado of 1861, pp. 201 *et seq.*

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of leaving such copy, all the goods and effects in the hands of such attorney, agent, factor, or trustee, and any debt due from such debtor to the defendant, shall be secured in his hands, to pay such judgment as the plaintiff shall recover, and may not otherwise be disposed of, by such attorney, agent, factor, trustee, or debtor.

The garnishee so summoned may be required to appear in court, and answer on oath whether he has any goods or effects of the defendant, or is indebted to him.

Any debt, legacy, or distributive share, due, or which may become due, to any person, from the estate of any deceased person, or from any insolvent estate assigned for the benefit of creditors, may be attached in the hands of the executor, administrator, or trustee.[1]

DELAWARE.

A writ of domestic attachment issues against an inhabitant of this State after a return to a summons, or capias, sued and delivered to the sheriff, ten days before the return thereof, showing that the defendant cannot be found, and proof, satisfactory to the court, of the cause of action; or upon affidavit made by the plaintiff, or some other credible person, that the defendant is justly indebted to the plaintiff in a sum exceeding fifty dollars, and has absconded from the place of his usual abode, or gone out of the State, with intent to defraud his creditors, or to elude process, as is believed.

A writ of foreign attachment issues against any person not an inhabitant of this State, after a return to a summons, or capias, issued and delivered to the sheriff, ten days before the return thereof, showing that the defendant cannot be found, and proof, satisfactory to the court, of the cause of action; or upon affidavit made by the plaintiff, or some other credible person, that the defendant resides out of the State, and is justly indebted to the plaintiff in a sum exceeding fifty dollars.

The writ of attachment commands the officer to attach the defendant by all his goods and chattels, rights and credits, lands and tenements, in whose hands, or possession, soever, the same may be found in his bailiwick; and to summon the defendant's garnishees to appear in court to declare what goods, chattels, rights, credits, moneys, or effects they have in their hands.

The attachment is dissolved by the defendant's appearing and putting in special bail, at any time before judgment.

On the return of the writ, the court appoints three persons to audit the claims of the defendant's creditors, and to adjust and ascertain all their demands, including that of the attachment plaintiff. These auditors give public notice to the defendant's creditors, of the time and place of their meetings;

[1] For the provisions other than those relating to garnishees, see Revised Statutes of Connecticut of 1849, pp. 49, 50; for those relating to garnishees, see *Ibid.* 115, 119, 120

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and they investigate any claims presented, in any form they judge best, and may examine any creditor upon oath.

On the receipt of the proceeds of sale of the property attached, the auditors calculate and settle the proportions and dividends due the several creditors, allowing to the creditor attaching and prosecuting the same to judgment, a double share, or dividend, if such shall not exceed his debt.

Creditors failing to present their claims to the auditors, or to make proof thereof, are debarred from receiving any share or dividend in the distribution to be made by the auditors; and before any creditor shall receive any dividend, he must enter into recognizance, with surety, to secure the repayment of the same, if the debtor shall, within one year thereafter, appear in the court, and disprove or avoid the debt upon which the dividend is paid.[1]

FLORIDA.

An attachment issues, upon the plaintiff, his agent or attorney, making oath in writing, that the amount of the debt or sum demanded is actually due, and also that the party from whom it is due is actually removing out of the State, or resides beyond the limits thereof, or absconds, or conceals himself, so that the ordinary process of law cannot be served upon him, or is removing his property beyond the limits of the State, or secreting, or fraudulently disposing of the same, for the purpose of avoiding the payment of his just debts.

When an executor or administrator resides or has removed beyond the limits of this State, and there are assets of the testator or intestate in this State, an attachment may be obtained against such assets, upon oath being made of the debt or sum demanded being actually due, and that the executor or administrator resides or has removed beyond the limits of the State; unless he have an authorized and publicly known agent in the State; in which case a summons served on the agent is as valid as if served on his principal.

No attachment issues until the plaintiff, in person, or by his agent or attorney, enters into bond, with at least two good and sufficient securities, payable to the defendant, in at least double the debt or sum demanded, conditioned to pay all costs and damages the defendant may sustain in consequence of improperly suing out the attachment; and this bond shall not, on account of informality, be adjudged void, as against the obligors, nor shall they be discharged therefrom, although the attachment be dissolved by reason thereof.

In the case of two or more attachments against the same person, and several judgments obtained at the same term, they shall be satisfied *pro rata*, out of the judgments obtained against the garnishees in any of the

[1] Revised Statutes of Delaware of 1852, ch. 104.

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suits, unless the defendant have sufficient other property to satisfy the same.

An attachment may issue on a debt not due, if the same will become due within nine months from the time the writ is applied for, and the debtor is at that time actually removing his property beyond the limits of the State, or is fraudulently disposing of or secreting the same, for the purpose of avoiding the payment of his just debts.

Where no property of the defendant can be found to levy on, any person owing the defendant, or having any moneys, goods, chattels, or effects of the defendant in his hands, may be summoned as garnishee; but if the plaintiff fail to obtain a judgment against the garnishee, no judgment shall be rendered against the defendant, and if judgment shall have been rendered against him, it shall be cancelled.[1]

GEORGIA.

The judges of the superior court, or justices of the inferior court, or any one of them, and any justice of the peace, upon complaint made on oath by a creditor that his debtor resides out of the State, or is actually removing without the limits of the State, or any county, or absconds, or conceals himself, or stands in defiance of a peace officer, so that the ordinary process of law cannot be served on him, may grant an attachment against the estate of such debtor. The remedy by attachment may be resorted to by non-resident as well as resident creditors.

The affidavit may be made by the creditor, or his agent or attorney, in fact or at law, by swearing to the best of his belief, from the evidence in his possession; and in case of non-resident creditors may be made before any Commissioner appointed by the State of Georgia to take affidavits, or before any judge or judicial officer authorized to administer oaths, or before any Notary Public.

Before the attachment can issue, the plaintiff, or his agent or attorney at law, or in fact, shall execute a bond to the defendant, with security, in a sum at least equal to double the amount sworn to be due, or to become due, for satisfying and paying all costs which may be incurred by the defendant, in case the plaintiff shall discontinue, or be cast in, his suit, and also all damages which may be recovered against the plaintiff for suing out the same.

Where a debt is not due, and the debtor is removing, or is about to remove without the limits of the State, and oath is made by the creditor, his agent or attorney, of the amount of the debt to become due, and that the debtor is removing, or is about to remove without the limits of the State, an attachment may issue against the property of the debtor.

In any case where a person has been a security for another in a note,

[1] Thompson's Digest of Florida Laws, of 1847, pp. 367–375.

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obligation, or other instrument of writing, and has been compelled to pay off the same by legal process, or has paid by being called upon by the person holding such note, obligation, or other instrument in writing; and in cases where suit is pending on such note, &c., against the principal, and security or securities, or against either or any of them, and in cases where such note, &c., to which there is security is not due and the principal debtor is removing, or is about to remove, or has removed without the limits of the State or any county; and oath being made by the security, his agent, or attorney, in fact or at law, of the facts, and of his liability on such note, &c., and that his principal is removing, or is about to remove, or has removed, without the limits of the State, or any county therein, an attachment may issue against the debtor, in favor of the security. And in such cases, where the security has already paid the debt, he may proceed to judgment as in other cases; and where a suit is pending against the security, or where the debt is not yet due, the security shall have a lien on the attached property of the principal, until such property is replevied, or the principal shall give good and sufficient security to the plaintiff for the payment of such note, &c., when it shall become due, or at the termination of the suit: — and in case the property shall not be replevied, the plaintiff shall be admitted to proceed to establish his demand as though the debt was due, or the suit against the security was determined.

Indorsers of notes, obligations, and all other instruments in writing, are entitled to the same remedy as provided for securities.

In all cases the attachment first served shall be first satisfied.

No lien shall be created by the levying of an attachment, to the exclusion of any judgment obtained by any creditor, before judgment is obtained by the attaching creditor.

Judgment on attachment shall bind no other property than that attached, unless the defendant shall come in terms of the law, and be made a party to the attachment.

Garnishments are not restricted to cases of attachment, but may be made in all cases whatsoever, either at law or in equity, whether the subject-matter of the suit be a debt or not; upon the plaintiff, or his agent or attorney, making an affidavit of the amount of the debt which he believes to be due, and that he is apprehensive of the loss of the same or some part thereof unless the summons of garnishment issue; and may be made in all cases where execution has been issued on a judgment.

Garnishees are required to answer as to indebtedness to the defendant, and also as to money, effects, property, either real or personal, or evidences of debt belonging to the defendant, in their hands or possession, at the time of service of the summons.[1]

[1] Hotchkiss's Compilation of Georgia Laws, of 1845, pp. 551–562; Cobb's Digest of Georgia Laws, of 1851, pp. 69–88.

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ILLINOIS.

Attachments are issued by the Clerks of the Circuit Courts.

If any creditor, his agent or attorney, file an affidavit in the office of the Clerk, setting forth that the defendant is indebted to him, in a sum exceeding twenty dollars, stating the nature and amount of the indebtedness, as near as may be, and that the defendant has departed, or is about to depart, from the State, with the intention of having his effects removed therefrom; or is about to remove his property from the State, to the injury of the plaintiff; or conceals himself, or stands in defiance of an officer, so that process cannot be served upon him; or is not a resident of the State; the Clerk issues an attachment, commanding the lands, tenements, goods, chattels, rights, credits, moneys, and effects of the defendant, of every kind, in whose hands or possession the same may be found, or so much thereof as will be sufficient to satisfy the claim sworn to, with interest and costs of suit.

Before issuing the attachment, the Clerk shall take bond and security from the plaintiff, his agent or attorney, payable to the defendant, in double the sum sworn to be due, conditioned that the plaintiff shall prosecute his suit with effect, or, in case of failure therein, shall well and truly pay and satisfy the defendant all such costs in the suit, and such damages as shall be awarded against the plaintiff, his heirs, executors, or administrators, in any suit or suits which may be brought for wrongfully suing out the attachment.

One or more of several joint debtors may be sued by attachment, and the others by summons.

The officer summons as garnishees all persons whom the plaintiff designates as having any property, effects, or choses in action, in their possession or power belonging to the defendant, or who are in any wise indebted to the defendant, to appear in court on the return day of the writ, and answer on oath what amount they are indebted to the defendant, and what property, effects, or choses in action belonging to the defendant they had in their possession or power, at the time of serving the attachment.

Garnishees are required to respond, in writing and under oath, to allegations and interrogatories filed by the plaintiff, touching the lands, tenements, goods, chattels, moneys, credits, and effects of the defendant, and the value thereof, in their possession, custody, or charge, or from them due and owing to the defendant, at the time the attachment was served, or at any time after, or which may thereafter become due.

Whenever the plaintiff shall allege that any garnishee has not discovered the true amount of debts due from him to the defendant, or what goods and chattels belonging to the defendant are in his possession, the court shall direct a jury to be impanelled, to inquire what is the true amount due

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from the garnishee to the defendant, and what goods and chattels are in his possession belonging to the defendant. Upon this inquiry witnesses may be examined by the respective parties as in ordinary cases.[1]

INDIANA.

The plaintiff, at the commencement of an action, or at any time afterwards, may have an attachment against the property of the defendant, in the cases and in the manner following: —

Where the action is for the recovery of money,

1. Where the defendant, or one of several defendants, is a foreign corporation, or a non-resident of this State;

2. Where the defendant, or one of several defendants, is secretly leaving, or has left the State, with intent to defraud his creditors; or,

3. So conceals himself that a summons cannot be served upon him; or,

4. Is removing or about to remove his property subject to execution, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiff's claim; or,

5. Has sold, conveyed, or otherwise disposed of his property subject to execution, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors; or,

6. Is about to sell, convey, or otherwise dispose of his property, subject to execution, with such intent.

No attachment, except for the causes mentioned in the fourth, fifth, and sixth clauses, shall issue against any debtor while his wife and family remain settled within the county where he usually resided prior to his absence, if he shall not continue absent from the State more than one year after he shall have absented himself, unless an attempt be made to conceal his absence.

If the wife or family of the debtor shall refuse, or are unable to give an account of the cause of his absence, or of the place where he may be found, or give a false account of either, such refusal, inhability, or false account, shall be deemed an attempt to conceal his absence.

The plaintiff, or some person in his behalf, must make an affidavit showing, —

1. The nature of the plaintiff's claim;

2. That it is just;

3. The amount which he believes the plaintiff ought to recover;

4. That there exists in the action some one of the grounds for an attachment above enumerated.

The plaintiff, or some one in his behalf, must execute a written undertaking, with sufficient surety, to be approved by the clerk, payable to the defendant, to the effect that the plaintiff will duly prosecute his proceeding

[1] Revised Statutes of Illinois, 1845, ch. 9, pp. 62 – 70.

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in attachment, and will pay all damages which may be sustained by the defendant, if the proceedings of the plaintiff shall be wrongful and oppressive.

Upon the filing of such affidavit and written undertaking, in the office of the clerk, he issues an order of attachment to the sheriff, which binds the defendant's property in the county, and becomes a lien thereon, from the time of its delivery to the sheriff, in the same manner as an execution.

Under this order, property, real and personal, is attached, and garnishees are summoned. If, after an order of attachment is placed in the hands of a sheriff, any property of the defendant's is removed from the county, the sheriff may pursue and attach it in any county within three days after the removal.

Estate descended to non-resident heirs or devisees, or vested in non-resident executors or administrators, shall be liable to an attachment for debt or other demands against the decedent's estate.

If when an order of attachment issues, or at any time before or afterwards, the plaintiff, or other person in his behalf, shall file with the clerk an affidavit that he has good reason to believe that any named person has property of the defendant of any description in his possession, or under his control, which the sheriff cannot attach by virtue of such order; or that such person is indebted to the defendant, or has the control or agency of any property, moneys, credits, or effects; or that the defendant has any shares or interest in the stock of any association or corporation; the clerk shall issue a summons notifying such person, corporation, or association, to appear and answer as garnishee in the action.

Any creditor of the defendant, upon filing his affidavit and written undertaking, as required of the attaching creditor, may, at any time before the final adjustment of the suit, become a party to the action, file his complaint, and prove his claim or demand against the defendant, and may have any person summoned as garnishee or held to bail, who has not before been summoned or held to bail.

The money realized from the attachment and the garnishees shall, under the direction of the court, be paid to the several creditors, in proportion to the amount of their several claims as adjusted.[1]

IOWA.

In an action for the recovery of money, the plaintiff may cause any property of the defendant which is not exempt from execution, to be attached at the commencement, or during the progress, of the proceedings.

The grounds for obtaining the attachment are embodied in the petition setting forth the cause of action, which must be sworn to, and must state that, as the affiant verily believes, the defendant is a foreign corporation, or acting as such, or that he is a non-resident of the State, or that he is

[1] 2 Revised Statutes of Indiana, of 1852, p. 62.

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in some manner about to dispose of or remove his property out of the State, without leaving sufficient remaining for the payment of his debts, or that he has disposed of his property (in whole or in part), with intent to defraud his creditors, or that he has absconded, so that the ordinary process cannot be served upon him.

If the plaintiff's demand is founded on contract, the petition must state that something is due, and, as nearly as practicable, the amount.

If the demand is not founded on contract, the petition must be presented to some judge of the supreme, district, or county court, who shall make an allowance thereon of the amount in value of the property that may be attached.

Property of a debtor may be attached previous to the time when the debt becomes due, when nothing but time is wanting to fix an absolute indebtedness, and when the petition, in addition to that fact, states that the defendant is about to dispose of his property with intent to defraud his creditors, or that he is about to remove from the State, and refuses to make any arrangement for securing the payment of the debt when it falls due, and which contemplated removal was not known to the plaintiff at the time the debt was contracted.

Before any property can be attached, the plaintiff must file with the clerk a bond, for the use of the defendant, with sureties to be approved by the clerk, in a penalty at least double the value of the property sought to be attached, and in no case less than two hundred and fifty dollars, if in the district court, nor less than fifty dollars, if in a justice's court, conditioned that the plaintiff will pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment. In an action on such bond the plaintiff therein may recover, if he shows that the attachment was wrongfully sued out, and if wilfully wrong, he may recover exemplary damages. Nor need he wait until the principal suit is determined, before he brings suit on the bond.

Stock, or an interest owned by the defendant in any company, and also debts due him, or property of his held by third persons, may be attached.

A sheriff or constable may be garnished for money of the defendant in his hands. So may a judgment debtor of the defendant, when the judgment has not been previously assigned; and also an executor, for money due from the decedent to the defendant.

The plaintiff may, in writing, direct the sheriff to take the answer of the garnishee, and append the same to his return. In such case the sheriff has power to administer an oath to garnishees, requiring them to make true answers to the questions to be propounded, the form of which is prescribed, and which requires the garnishee to state whether he is indebted to the defendant, or has in his possession or under his control any property, rights, or credits of the defendant, or knows of any debts owing to the defendant,

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whether due or not, or any property, rights, or credits belonging to him, and in the possession or under the control of others.

If the garnishee refuse to answer fully and unequivocally the interrogatories, he shall be required to appear and answer on the first day of the next term of the court.

When the answer of the garnishee is made at the district court, the plaintiff may controvert any facts contained therein, and specified by him, and issue being thereupon joined, may be tried in the usual manner.[1]

KANSAS.

The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, upon any of the following grounds:

1. When the defendant is a foreign corporation, or a non-resident of this State; or,

2. Has absconded, with the intent to defraud his creditors; or,

3. Has left the county of his residence, to avoid the service of a summons; or,

4. So conceals himself that a summons cannot be served upon him; or,

5. Is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors; or,

6. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,

7. Has property, or rights in action, which he conceals; or,

8. Has assigned, removed, or disposed of, or is about to dispose of, his property, or part thereof, with the intent to defraud his creditors; or,

9. Fraudulently contracted the debt, or incurred the obligation, for which suit has been or is about to be brought.

An order of attachment is made by the clerk of the court in which the action is brought, in any of the cases mentioned, when there is filed in his office an affidavit and undertaking.

The affidavit must be made by the plaintiff, his agent or attorney, and show

1. The nature of the plaintiff's demand;

2. That it is just;

3. The amount which the affiant believes the plaintiff ought to recover; and

4. The existence of some one of the above grounds for an attachment.

The undertaking must be by one or more sureties of the plaintiff, to be approved by the clerk, not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay to the defendant all damages, which he may sustain by reason of the attachment, if the order be wrongfully obtained.

Under the writ the officer may attach lands, tenements, goods, chattels, stocks, rights, credits, moneys, and effects.

[1] Code of Iowa, of 1851, ch. 109, pp. 264 – 269.

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Garnishees may be summoned, upon the plaintiff, his agent or attorney, making oath, in writing, that he has good reason to believe, and does believe, that any person or corporation, to be named, has property of the defendant (describing the same) in his possession; and the garnishee stands liable, from the time of service of notice upon him, to the plaintiff, for all property, moneys, and credits in his hands, or due from him to the defendant.

The court, or judge, in vacation, may appoint a receiver, who shall take possession of all notes, due-bills, books of account, accounts, and all other evidences of debt that have been taken by the officer, and proceed to settle and collect the same.

Where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts, or is about to make such sale, or conveyance, or disposition of his property, with such fraudulent intent; or is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts, a creditor may bring an action on his claim before it is due, and have an attachment against the property of the debtor.

In such case the plaintiff, his agent or attorney, must make oath, in writing, showing the nature and amount of the plaintiff's claim, that it is just, when the same will become due, and the existence of some one of the grounds of attachment just mentioned as applicable to this particular case.[1]

KENTUCKY.

The plaintiff in a civil action may, at or after the commencement thereof, have an attachment against the property of the defendant, in the cases and upon the grounds hereinafter stated, as a security for the satisfaction of such judgment as may be recovered: —

First. In an action for the recovery of money where the action is against

1. A defendant or several defendants, who, or some one of whom, is a foreign corporation, or a non-resident of this State; or,

2. Who has been absent therefrom four months; or,

3. Has departed from this State with intent to defraud his creditors; or,

4. Has left the county of his residence, to avoid the service of a summons; or,

5. So conceals himself that a summons cannot be served upon him; or,

6. Is about to remove his property, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiff's claim; or,

7 Has sold, conveyed, or otherwise disposed of his property, or suffered

[1] Compiled Laws of Kansas of 1862, pp. 154 – 164.

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or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors; or,

8. Is about to sell, convey, or otherwise dispose of his property, with such intent.

But an attachment shall not be granted on the ground that the defendant, or defendants, or any of them, is a foreign corporation, or a non-resident of this State, for any claim other than a debt or demand arising upon contract.

Secondly. In an action to recover the possession of personal property, where it has been ordered to be delivered to the plaintiff, and where the property, or part thereof, has been disposed of, concealed, or removed, so that the order for its delivery cannot be executed by the sheriff.

An order of attachment is made by the clerk of the court in which the action is brought, in any of the above-mentioned cases, upon an affidavit of the plaintiff being filed, showing, —

1. The nature of the plaintiff's claim;

2. That it is just;

3. The amount which the affiant believes the plaintiff ought to recover; and,

4. The existence in the action of some one of the grounds for an attachment above enumerated, in the first subdivision; and in the case mentioned in the second subdivision, where it is shown, by such affidavit, or by the return of the sheriff upon the order for the delivery of the property claimed, and the facts mentioned in that subdivision exist.

Where the return by the proper officer upon a summons against a defendant states that he has left the county to avoid the service of the summons, or has concealed himself therein for that purpose, it shall be equivalent to the statement of the fact in an affidavit.

The order of attachment shall not be issued until there has been executed in the clerk's office, by one or more sufficient sureties of the plaintiff, a bond to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of the attachment, if the order is wrongully obtained, not exceeding double the amount of the plaintiff's claim.

The attachment is to be served first on the defendant's personal property, other than slaves; if enough thereof is not found, then on his slaves; and lastly, on his real estate.

Where the property to be attached is a fund in court, the execution of the order of attachment shall be by leaving with the clerk of the court a copy thereof, with a notice specifying the fund; and where several orders of attachment are executed upon such fund on the same day, they shall be satisfied out of it ratably.

The sheriff shall not, in executing an order of attachment upon personal property held by the defendant jointly or in common with another person,

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take possession of such property, until there has been executed a bond to such other person, by one or more sufficient sureties of the plaintiff, to the effect that he shall pay to such person the damages he may sustain by the wrongful suing out of the order, not exceeding double the amount of the plaintiff's claim.

An order of attachment binds the defendant's property in the county, which might be seized under an execution against him, from the time of the delivery of the order to the sheriff, in the same manner as an execution would bind it; and the lien of the plaintiff is completed upon any property or demand of the defendant, by executing the order upon it in the manner directed by law.

Garnishees may be summoned, and are required to answer on oath.[1]

LOUISIANA.

The process of attachment in this State belongs to the class of proceedings known in the Code of Practice as Conservatory Acts which may accompany the demand.

An attachment in the hands of third persons is a mandate, which a creditor obtains from a competent judge, or a clerk of a court, commanding the seizure of any property, credit, or right belonging to his debtor, in whatever hands it may be found, to satisfy the demand which he intends to bring against him.

A creditor may obtain such attachment of the property of his debtor, in the following cases: —

1. When the debtor is about leaving permanently the State, without there being a possibility, in the ordinary course of judicial proceedings, of obtaining or executing judgment against him previous to his departure, or when the debtor has already left the State permanently;

2. When the debtor resides out of the State;

3. When he conceals himself to avoid being cited and forced to answer to the suit intended to be brought against him.

A creditor may in the like manner obtain a mandate of seizure against all species of property belonging to his debtor, real or personal, whether it consists of slaves, credits, or rights of action, and whether it be in the debtor's possession, or in that of third persons, by whatever title the same be held, either as deposit or placed under their custody.

The property of a debtor may be attached in the hands of third persons by his creditor, in order to secure the payment of a debt, whatever may be its nature, whether the amount be liquidated or not, provided the term of payment have arrived, and the creditor, his agent, or attorney in fact, who prays for the attachment, state expressly and positively the amount which he claims.

[1] Kentucky Code of Practice in Civil Cases, of 1851, § 242 and following.

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Where the debt or obligation is not yet due, any judge of competent jurisdiction may order a writ of attachment to issue, whenever he shall be satisfied by the oath of the creditor or his agent of the existence of the debt, and upon the creditor or his agent swearing that the debtor is about to remove his property out of the State before the debt becomes due.

A creditor, wishing to have the property of his debtor attached, must demand it in a petition presented to a competent judge, with a declaration made under oath at the foot of the petition, stating the amount of the sum due to him, and that he verily believes that his debtor is either on the eve of leaving the State forever; that he has left it permanently; that he resides out of the State; or that he conceals himself in order to avoid being cited. In the absence of the creditor, the oath may be made by the agent or attorney in fact of the creditor, to the best of his knowledge and belief.

The creditor, his agent or attorney in fact, praying such attachment, must, besides, annex to his petition his obligation in favor of the defendant, for a sum exceeding by one half that which he claims, with the surety of one good and solvent person, residing within the jurisdiction of the court to which the petition is presented, as a security for the payment of such damages as the defendant may recover against him, in case it should be decided that the attachment was wrongfully obtained.

If a creditor know, or suspect, that a third person has, in his possession, property belonging to his debtor, or that he is indebted to the debtor, he may make such person a party to the suit, by having him cited, to declare on oath what property belonging to the defendant he has in his possession, or in what sum he is indebted to the defendant, even when the term of payment has not yet arrived. The person thus made a party to the suit is termed the garnishee; and he is required to answer categorically under oath interrogatories propounded to him by the plaintiff.[1]

MAINE.

In this State an original writ may be framed either to attach the goods or estate of the defendant, or for want thereof to take his body; or it may be an original summons, either with or without an order to attach the goods or estate.

All goods and chattels may be attached, and held as security to satisfy the judgment for damages and costs, which the plaintiff may recover, except such as from their nature and situation have been considered as exempted from attachment, according to the principles of the common law, as adopted and practised in this State, and such as are hereinafter mentioned.

[1] These provisions are found in Articles 208, 209, 239, 240, 241, 242, 243, 244, 245, 246, and 247, of Part II. Title 1, ch. 2, § 4, of the Louisiana Code of Practice, and in Bullard and Curry's Digest of Louisiana Laws, 18 and 19.

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Real estate, liable to be taken on execution, may be attached.

A right in equity of redeeming lands mortgaged, or taken in execution, may be attached on mesne process; and, when so attached, if, before the levy of the execution, the lands so mortgaged or taken in execution are redeemed, and the encumbrance removed, the attachment shall hold the premises discharged of the mortgage or levy, as effectually as if no mortgage or levy had existed, and the premises been attached.[1]

All personal actions, except those of detinue, replevin, actions on the case for malicious prosecution, slander by writing or speaking, and those for assault and battery, may be commenced by foreign attachment, or trustee process, in the supreme judicial court, or district court, or, when the amount demanded in damages is not less than five dollars, nor more than twenty dollars, before a municipal or police court, or a justice of the peace.

The writ authorizes an attachment of goods and estate of the principal defendant, in his own hands, as well as in the hands of trustees.

Service of the writ on the trustee shall bind all goods, effects, or credits of the defendant, intrusted or deposited in his hands or possession, to respond the final judgment in the action, in like manner as goods or estate, when attached by the ordinary process.

Any debt or legacy, due from an executor or administrator, and any goods, effects, and credits in his hands as such, may be attached by process of foreign attachment.

When any person summoned as trustee is bound to deliver to the defendant any specific articles, he shall deliver the same, or so much thereof as may be necessary, to the officer holding the execution; and the same may be sold by the officer, and the proceeds applied and accounted for, in the same manner as if they had been taken on execution in common form.

No person shall be adjudged a trustee in either of the following cases, viz.:

1. By reason of having drawn, accepted, made, or indorsed any negotiable bill, draft, note, or other security;

2. By reason of any money or other thing, received or collected by him, as a sheriff or other officer, by force of an execution or other legal process in favor of the defendant in the foreign attachment, although the same should have been demanded of him, previously, by the defendant;

3. By reason of any money in his hands as a public officer, and for which he is accountable, as such merely, to the defendant;

4. By reason of any money or other thing, due from him to the defendant, unless it is, at the time of the service of the writ upon him, due absolutely, and without depending on any contingency;

5. By reason of any debt due from him on a judgment, so long as he is liable to an execution on the judgment;

[1] Revised Statutes of Maine, of 1840-41, pp. 484, 485

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6. By reason of any amount due from him to the defendant, as wages for his personal labor, for a time not exceeding one month;

7. Where service was made on him by leaving a copy, and before actual notice of such service, or reasonable ground of belief that the same has been made, he shall have paid the debt due to the defendant, or given his negotiable security therefor.

Any money, or other thing, due to the defendant, may be attached before it has become payable, provided it be due absolutely and without any contingency; but the trustee shall not be compelled to pay or deliver it before the time appointed therefor by the contract.[1]

MARYLAND.

A creditor may obtain an attachment, whether he be a citizen thereof or not, against his debtor, who is not a citizen thereof and not residing therein.

If any citizen of the State, being indebted to another citizen thereof, shall actually run away, abscond, or fly from justice, or secretly remove himself from his place of abode, with intent to evade the payment of his just debts, an attachment may be obtained against him.

On the oath or affirmation of the creditor, made before any judge of the general court, justice of the county court, or justice of the peace of this State, or before any judge of any other of the United States, that the debtor is *bonâ fide* indebted to him, in a sum named, over and above all discounts, and at the same time producing the bond, bill, protested bill of exchange, promissory note, or other instrument of writing, or account, by which the debtor is indebted; and also, on the oath of the creditor, of the existence of any of the grounds above mentioned as authorizing the issuing of an attachment; the judge of the general court, justice of the county court, or justice of the peace, issues his warrant to the clerk of the court, to issue, and the clerk thereupon issues, an attachment against the lands, tenements, goods, chattels, and credits of the defendant.[2]

An attachment may be laid upon debts due the defendant upon judgments or decrees, rendered or passed by any court of this State, and judgment of condemnation thereof may be had, as upon other debts due the defendant. Execution may nevertheless issue upon such judgment; but the money made thereon shall be paid into court to abide the event of the attachment proceedings.[3]

It may also be laid upon any interest the defendant may have in the capital or joint-stock of any corporation, or in the debt of any corporation, transferable upon the books thereof.[4]

[1] Revised Statutes of Maine, of 1840–41, pp. 527–535.
[2] Dorsey's Compilation of Laws of Maryland, 320.
[3] Ibid. 1067
[4] Ibid. 1101

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The provisions of the law extend to corporations, whether plaintiffs or defendants.[1]

A garnishee is required to answer on oath written interrogatories, touching the property of the defendant in his possession or charge, or by him due and owing at the time of serving the attachment, or at any other time; and if the garnishee fail to do so, the court is required to render judgment against him for the amount of the judgment against the defendant.[2]

A garnishee may plead on behalf of the defendant such pleas as the defendant might do, if he had appeared to the action.[3]

Some confusion existed, prior to the passage of the Act of 1854, ch. 153, as to the parties who might obtain or become subject to proceedings on attachment. This state of things was ended by the passage of the last-named act, by which it was provided, that every person and every body corporate, that has the right to become a plaintiff in any action or proceeding before any judicial tribunal in this State shall have the right to become a plaintiff in an attachment against a non-resident of this State or against a person absconding: — and that every person, who does not reside in this State, and every person who absconds, may be made a defendant in attachment.

Every person who shall actually run away, abscond, or fly from justice, or secretly remove him or herself from his or her place of abode, with intent to evade the payment of his or her just debts, or to injure or defraud his or her creditor or creditors, shall be considered as having absconded: and an averment in the oath of the plaintiff against a person as having absconded, shall without other words be a sufficient averment of any such conduct.

MASSACHUSETTS.

Original writs may be framed, either to attach the goods or estate of the defendant, or for want thereof to take his body; or, they may be an original summons, either with or without an order to attach the goods or estate.

All real estates, that are liable to be taken in execution, may be attached upon the original writ, in any action in which any debt or damages are recoverable, and held as security to satisfy such judgment as the plaintiff may recover.

All goods and chattels, that are liable to be taken in execution, may be attached, except such as from their nature and situation have been considered as exempted from attachment, according to the principles of the common law, as adopted and practised in this State.[4]

All personal actions may be commenced by the process of foreign attachment, or trustee process, except actions of replevin, actions on the case for

[1] Ibid. 1089. [2] Ibid. 321. [3] Ibid. 321.

[4] Revised Statutes of Massachusetts, of 1836, pp. 547, 549.

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malicious prosecution, or for slander, either by writing or speaking, and actions of trespass for assault and battery.

The writ shall authorize an attachment of the goods and estate of the defendant, in his own hands, and also in the hands of the trustees.

Every person, having any goods, effects, or credits of the defendant, intrusted or deposited in his hands or possession, may be summoned as trustee, and such goods, effects, and credits shall thereby be attached and held to respond to the final judgment in the suit, in like manner as goods or estate, when attached by the ordinary process.

The answers and statements, sworn to by any person summoned as a trustee, shall be considered as true, in deciding how far he is chargeable, but either party may allege and prove any other facts, not stated nor denied by the supposed trustee, that may be material in deciding that question.

No person shall be adjudged a trustee, in either of the following cases, to wit: —

1. By reason of having drawn, accepted, made, or indorsed any negotiable bill, draft, note, or other security;

2. By reason of any money or other thing, received or collected by him, as a sheriff or other officer, by force of an execution or other legal process, in favor of the defendant, although the same should have been previously demanded of him by the defendant;

3. By reason of any money in his hands as a public officer, and for which he is accountable, merely as such officer to the defendant;

4. By reason of any money or other thing due from him to the defendant, unless it is, at the time of the service of the writ on him, due absolutely, and without depending on any contingency;

5. By reason of any debt due from him on a judgment, so long as he is liable to an execution on the judgment.

Legacies and debts due from executors and administrators, and any other goods, effects, or credits, in the hands of executors or administrators, as such, may be attached.[1]

MICHIGAN.

The grounds of attachment in this State are, —

1. That the defendant has absconded, or is about to abscond, from this State, or that he is concealed therein to the injury of his creditors; or,

2. That he has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, any of his property, with intent to defraud his creditors; or,

3. That he has removed, or is about to remove, any of his property out of this State, with intent to defraud his creditors; or,

[1] Revised Statutes of Massachusetts, of 1836, pp. 643 – 651.

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4. That he fraudulently contracted the debt, or incurred the obligation, respecting which the suit is brought; or,

5. That he is not a resident of this State, and has not resided therein for three months immediately preceding the time of making the affidavit for obtaining the attachment; or,

6. That the defendant is a foreign corporation.

In order to obtain an attachment, the plaintiff, or some person for him, must make an affidavit that the defendant is indebted to the plaintiff, and specifying the amount of the indebtedness, as near as may be, over and above all legal set-offs, and that the same is due upon contract, express or implied, or upon judgment, and that the deponent knows, or has good reason to believe, the existence of some one of the grounds above stated, for obtaining an attachment.

The writ commands the sheriff to attach so much of the lands, tenements, goods, chattels, moneys, and effects of the defendant, not exempt from execution, wheresoever the same may be found within the county, as will be sufficient to satisfy the plaintiff's demand.[1]

MINNESOTA.

In an action for the recovery of money, the plaintiff at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached, in the manner hereinafter stated, as security for the satisfaction of such judgment as the plaintiff may recover.

The warrant of attachment is issued whenever the applicant, or some other person, makes affidavit that a cause of action exists against the defendant, specifying the amount of the claim, and the ground thereof, and that, as the applicant verily believes, the defendant is, either,

1. A foreign corporation; or,

2. Is not a resident of this State; or,

3. Has departed therefrom with the intent to hinder or delay his creditors, or to avoid the service of a summons; or,

4. Has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of, his property, so as to hinder or delay his creditors; or,

5. That the debt was fraudulently contracted.

Before issuing the warrant, the plaintiff must give a written undertaking, with sufficient surety, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars.

Under the warrant all property of the defendant may be attached, including his rights or shares in the stock of any corporation.[2]

[1] Revised Statutes of Michigan, of 1846, p. 514.

[2] Revised Statutes of Minnesota, of 1851, pp. 346–349.

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Proceedings against garnishees are not exclusively connected with suits by attachment, but may be conducted in any action, upon affidavit being made, that any person has property, money, or effects in his hands or under his control, belonging to the defendant, or is indebted to the defendant.

A summons then issues against the garnishee, and he is required to appear and answer under oath.[1]

MISSISSIPPI.

The remedy by attachment applies to all actions or demands, founded upon any indebtedness, or for the recovery of damages for the breach of any contract, express or implied, and to actions founded upon any penal statute.

An affidavit must be made by the plaintiff, his agent or attorney, of the amount of his debt or demand, to the best of his knowledge and belief, and of the existence of one or more of the following particulars: —

1. That the defendant is a foreign corporation, or a non-resident of this State.

2. That he has removed, or is about to remove, himself or his property out of this State.

3. That he so absconds, or conceals himself, that he cannot be served with a summons.

4. That he has property or rights in action, which he conceals, or unjustly refuses to apply to the payment of his debts.

5. That he has assigned or disposed of, or is about to assign or dispose of, his property, or rights in action, or some part thereof, with intent to defraud his creditors, or give an unfair preference to some of them.

6. That he has converted, or is about to convert, his property into money, or evidences of debt, with intent to place it beyond the reach of his creditors.

7. That he fraudulently contracted the debt, or incurred the obligation, for which suit has been or is about to be brought.

In addition to the required affidavit, a bond must be executed by the plaintiff, his agent or attorney, with surety, in double the sum for which the complaint is made, payable to the defendant, and conditioned that the plaintiff shall pay and satisfy the defendant all such damages as he shall sustain by reason of the wrongful suing out of the attachment, and shall pay all costs which may be awarded against the plaintiff in the suit.

The attachment may be levied on lands, tenements, slaves, money, goods, chattels, books of account, and evidences of indebtedness, belonging to the defendant, and on the stock, share, or interest which the defendant may have in any copartnership, or incorporated company; and garnishees may be summoned.

[1] Ibid. p. 451.

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An attachment may issue for a debt not due, if the creditor make affidavit that he has just cause to suspect, and verily believes, that his debtor will remove himself, or his effects, out of this State, before the debt will become due and payable, with intent to hinder, delay, or defraud his creditors, or that he hath removed with like intent, leaving property in this State; and shall give bond as in other cases.

The defendant may file a plea in abatement, verified by affidavit, traversing the truth of the alleged causes for which the attachment was sued out, and a jury shall be impanelled to try and determine whether the attachment was wrongfully sued out; and if they find that it was wrongfully sued out, they shall assess the damages against the plaintiff, for wrongfully suing out the same, and the attachment shall be dismissed, and judgment entered in favor of the defendant, for the costs and the damages assessed by the jury.[1]

MISSOURI.

The plaintiff in any civil action founded upon contract, or upon wrongs done to personal or real property, may have an attachment against the property of the defendant, or that of any one or more of several defendants, in any of the following cases: —

1. Where the defendant is not a resident of this State.

2. Where the defendant is a corporation whose chief office or place of business is out of this State.

3. Where the defendant conceals himself so that the ordinary process of law cannot be served upon him.

4. Where the defendant has absconded or absented himself from his usual place of abode in this State, so that the ordinary process of law cannot be served upon him.

5. Where the defendant is about to remove his property or effects out of this State, with the intent to defraud, hinder, or delay his creditors.

6. Where the defendant is about to remove out of this State with the intent to change his domicile.

7. Where the defendant has fraudulently conveyed or assigned his property or effects so as to hinder or delay his creditors.

8. When the defendant has fraudulently concealed, removed, or disposed of his property or effects so as to hinder or delay his creditors.

9. When the defendant is about fraudulently to convey or assign his property or effects so as to hinder or delay his creditors.

10. When the defendant is about fraudulently to conceal, remove, or dispose of his property or effects so as to hinder or delay his creditors.

11. When the cause of action accrued out of this State, and the defendant has absconded or secretly removed his property or effects into this State.

[1] Revised Code of Mississippi, of 1857, pp. 372-382

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12. Where the damages for which the action is brought are for injuries arising from the commission of some felony or misdemeanor.

13. When the debtor has failed to pay the price or value of any article or thing delivered, which by contract he was bound to pay upon the delivery.

An attachment may issue on a demand not yet due, in any of the foregoing cases, except the first, second, third, and fourth.

In order to obtain an attachment an affidavit must be made by the plaintiff, or some person for him, which shall state that the plaintiff has a just demand against the defendant, and the amount which the affiant believes the plaintiff ought to recover, and that he has good reason to believe, and does believe, in the existence of one or more of the causes of attachment above set forth. If the cause be alleged in the language of the statute as above set forth, it is sufficient.

Before the attachment can issue, the plaintiff, or some responsible person, as principal, with one or more securities, resident householders of the county in which the action is brought, must execute a bond in a sum at least double the amount sworn to, payable to the State of Missouri, conditioned that the plaintiff shall prosecute his action without delay, and with effect; refund all sums of money that may be adjudged to be refunded to the defendant, or found to have been received by the plaintiff, and not justly to him; and pay all damages and costs that may accrue to any defendant or garnishee, by reason of the attachment, or any process or proceeding in the suit, or by reason of any judgment or process thereon.

This bond may be sued on, at the instance and to the use of the party injured, in the name of the State.

In any suit thereon, any obligor may avail himself of any set-off he may have against the party to whose use the suit is brought with the same effect as if such party were plaintiff, and if such set-off shall exceed in amount the damages proven in behalf of such party, judgment shall be rendered against him in favor of the defendant setting up the set-off, for the amount of the excess and costs.

Under an attachment the officer is authorized to seize as attachable property the defendant's account-books, accounts, notes, bills of exchange, bonds, certificates of deposit, and other evidences of debt, as well as his other property, real, personal, and mixed; but no property declared by statute to be exempt from execution shall be attached, except in the cases of a non-resident defendant, or of a defendant who is about to move out of the State with intent to change his domicile.

All persons shall be summoned as garnishees who are named as such in the writ; and such others as the officers shall find in the possession of goods, money, or effects of the defendant not actually seized by the officer; and debtors of the defendant; and such persons as the plaintiff or his attorney shall direct.

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No sheriff, constable, or other officer charged with the collection of money shall, prior to the return day of an execution, or other process upon which the same may be made, be liable to be summoned as garnishee; nor shall any county collector, or municipal corporation, or any officer thereof or any administrator, or executor of an estate, prior to an order of distribution, or for payment of legacies, or allowing a demand found to be due by his estate, be liable to be summoned as garnishee; nor shall any person be charged as garnishee on account of wages due from him to a defendant in his employ; nor shall any person be so charged by reason of his having drawn, accepted, made, or indorsed any promissory note, bill of exchange, draft, or other security in its nature negotiable, unless it be shown at the hearing, that such note, bill, draft, or other security was the property of the defendant when the garnishee was summoned, and continued so to be until after it became due.

Notice of garnishment shall have the effect of attaching all personal property, money, rights, credits, bonds, bills, notes, drafts, checks, or other choses in action of the defendant in the garnishee's possession or charge, or under his control at the time of the service of the garnishment, or which may come into his possession or charge, or under his control, between that time and the time of filing his answer; but he shall not be liable to a judgment in money on account of such bonds, bills, notes, drafts, checks, or other choses in action, unless the same shall have been converted into money since the garnishment, or he fail, in such time as the court may prescribe, to deliver them into court, or to the sheriff or other person designated by the court.

The court, or in vacation the judge, may, in a proper case, on the application of the plaintiff, appoint a receiver, who shall take an oath faithfully to discharge his duty, and shall enter into bond to the State of Missouri, in such sum as the court or judge may direct, and with security approved by the court or judge for the faithful performance of his duty as receiver, and that he will pay over all money and account for all property which may come into his hands in virtue of his appointment, at such times and in such manner as the court may direct. This bond may be sued on in the name of the State, at the instance and to the use of any party injured.

Where notes, bills, books of account, accounts, or other evidences of debt are attached, they shall not be subject to be retained upon the execution of a delivery bond as hereinbefore provided, but shall be delivered to the receiver, who shall proceed with diligence to settle and collect the same.

For that purpose he may commence and maintain actions on the same in his own name; but in such actions no right of defence shall be impaired.

The receiver shall forthwith give notice of his appointment to the persons indebted to the defendant. The notice shall be written or printed. and

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shall be served on each debtor by copy delivered to him or left at his place of residence or business; or if he reside in another county, by copy deposited in the post-office and addressed to him at his place of residence; and from the date of such service, and knowledge thereof, every such debtor shall stand liable and shall account to the receiver for the amount of moneys and credits of the defendant in his hands, or due from him to the defendant.

The receiver shall, when required, report his proceedings to the court, and shall hold all moneys collected and all property received by him subject to the order of the court. He shall receive such compensation as the court may allow.

Until a receiver is appointed, the attaching officer shall have all the powers and perform all the duties of a receiver under this act, and may commence and maintain actions in his own name, as such officer, on debts or evidences of debt attached. He may in such case be required to give security other than his official bond; but if not so required, the sureties in his official bond shall be held liable as in other cases of his official action.

When the same property is attached in several actions by different plaintiffs against the same defendant, the court may settle and determine all controversies in relation to the property, and the priority, validity, good faith, force, and effect of the different attachments which may arise between any of the plaintiffs; and may dissolve any attachment, partially or wholly, or postpone it to another; or make such order in the premises as right and justice may require. If the writs issue from different courts of co-ordinate jurisdiction, such controversies shall be determined by that court out of which the first writ of attachment was issued, in order whereto the cause originating in the other court shall be transferred to it, and shall thenceforth be there heard, tried, and determined in all its parts as if it had been instituted therein. If any such controversy arise between a plaintiff in an action instituted in a court of general jurisdiction, and a plaintiff in an action instituted in a court of limited jurisdiction, the matter shall be determined by the former court to which the action commenced in the latter shall be transferred. And when the defendant has been notified by publication and does not appear, any plaintiff in the circumstances contemplated in this section may make any defence to any previous attachment, or to the action, which the defendant might; but no judgment on any issue made in such manner shall be binding on the defendant personally, or bar the plaintiff in the action so contested by an opposing plaintiff, from again suing the defendant on the same cause of action.[1]

[1] 1 Revised Statutes of Missouri, of 1855.

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NEW HAMPSHIRE.

In this State the writ of attachment, as distinguished from that form of such writ known as "foreign attachment" or "trustee process," issues as a matter of course, upon the institution of any personal action. It is declared in the law to be an original process in the courts, and commands the officer to attach the goods and estate of the defendant. Under it, all property, real and personal, which is liable to be taken in execution; shares of stock in any corporation; pews and seats in meeting-houses or places of public worship; and the franchise of any corporation authorized to receive tolls, so far as relates to the rights to receive tolls, with all the privileges and immunities belonging thereto; may be attached; but garnishees are not summoned.

Property so attached is holden until the expiration of thirty days from the time of rendering judgment in the action in favor of the plaintiff, that execution may issue thereon.

All personal actions may be commenced by the process of foreign attachment, or trustee process, except actions of replevin, actions on the case for malicious prosecution, or for slander or libel, and actions of trespass for assault and battery, and false imprisonment.

This trustee writ is an attachment and summons, and is served upon the defendant and the trustees (or garnishees) in the same manner as writs of summons.

The plaintiff may insert the names of as many persons as trustees as he may deem necessary, at any time before the process is served on the defendant, but not after.

A trustee may be required to answer, in writing, and under oath, interrogatories as to his liability as trustee; and every person summoned as trustee, and having in his possession any money, goods, chattels, rights, or credits of the defendant, at the time of the service of the writ on him, or at any time after such service and before his disclosure, shall be adjudged a trustee therefor.

Where a trustee is indebted to the defendant, judgment is rendered against him for the amount of the debt, if necessary to satisfy the claim against the defendant; but if the trustee have goods and chattels of the defendant, or is under contract to deliver specific articles to him, the judgment is against him for such goods, chattels, or specific articles; and if he deliver them he is discharged; but if he refuse to expose them so that the creditor may levy his execution thereon, the court, on return thereof made by any officer, grants a rule upon the trustee to show cause why execution should not issue against him and his own goods and estate; and upon such rule being duly served, and no sufficient cause shown to the contrary, judg-

[1] Revised Statutes of New Hampshire, of 1842, pp. 361, 367, 369.

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ment is rendered and execution issued against him for such sum as the court may think right and proper.[1]

NEW JERSEY.

If any creditor shall make oath or affirmation before any judge of any of the courts of record of this State, or justice of the peace of any county in the same, that he verily believes that his debtor absconds from his creditors, and is not, to his knowledge or belief, resident in the State at the time, the clerk of the supreme court, or of any circuit court, or court of common pleas, shall issue a writ of attachment, commanding the sheriff to attach the rights and credits, moneys and effects, goods and chattels, lands and tenements of such debtor, wheresoever they may be found.

If the creditor be absent or reside out of the State, the oath may be made by his agent or attorney.

The officer in executing the writ is authorized and required (having first made demand and being refused) to break open any house, chamber, room, shop, door, chest, trunk, or other place or thing, where he shall be informed, or have reason to believe, any money, goods, books of account, bonds, bills, notes, papers, or writings of the defendant may be deposited, secreted, had, or found.

On the return of the writ the clerk gives notice for two months successively, in some newspaper circulating in the State, of the attachment.

The court, on the return of the writ, appoints three auditors, to audit and adjust the demands of the plaintiff, and of so many of the defendant's creditors as shall have applied to the court, or to the auditors before they shall have made their report, for that purpose, and to make report in writing.

The auditors, or any two of them, may issue their warrant under their hands and seals, commanding the sheriff of the county, or any constable, to bring before them at a certain time and place therein specified, the wife of the defendant, or any other person, and examine them, by word of mouth or interrogatories in writing, touching all matters relating to the trade, dealings, moneys, debts, effects, rights, credits, lands, tenements, property, and estate of the defendant, and his secret grants, or fraudulent transfer or conveyance of the same; and they may also issue their warrant commanding the sheriff or constable (having first made demand and been refused) to break open any place or thing where they shall have reason to believe any moneys, goods, chattels, books of account, bonds, bills, notes, papers, or writings of the defendant, may be deposited, secreted, had, or found, and to seize and inventory the same, and make report thereof to the court at the next term.

[1] Revised Statutes of New Hampshire, of 1842, pp. 417–423.

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The auditors may also sue before justices of the peace for demands not exceeding one hundred dollars, due the defendant.

They are required to sell the property of the defendant, real and personal; after which they must give public notice in newspapers, requiring a meeting of the plaintiff, and creditors who may have applied, at a certain time and place; at which meeting, or other subsequent one, the auditors shall distribute among the plaintiff and creditors equally, and in a ratable proportion, according to the amount of their respective debts, as ascertained by the auditors' report, and the judgment of the court thereon, all the moneys arising from the sale of the goods and chattels, lands and tenements, first deducting legal costs and charges; and if the moneys be not sufficient to satisfy the debts, they shall assign to the plaintiff and creditors, the choses in action, rights and credits of the defendant, in proportion to their respective debts; which assignment shall vest the property and interest of the defendant in the assignee, so as he may sue for and recover the same in his own name and to his own use.

An attachment may also be obtained against non-resident debtors, and foreign corporations.

It issues against the heirs and devisees of a deceased debtor, in all cases in which it might lawfully have been issued against the debtor in his lifetime.

Legacies and distributive shares of estates in the hands of executors or administrators, may be attached.

Garnishees may be summoned, but the mode of proceeding against them, except where they are about to abscond, is not pointed out in the statute.[1]

NEW YORK.

In an action for the recovery of money against a corporation, created by or under the laws of any other State, government, or country, or against a defendant who is not a resident of this State, or against a defendant who has absconded or concealed himself as hereinafter mentioned, the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of such defendant attached in the manner hereinafter prescribed, as a satisfaction of such judgment as the plaintiff may recover.

A warrant of attachment must be obtained from a judge of the court in which the action is brought, or from a county judge.

The warrant may be issued whenever it shall appear by affidavit that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is either a foreign corporation, or not a resident of this State, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent.

[1] Revised Statutes of New Jersey, of 1846, pp. 48 – 63.

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Before issuing the warrant, the judge shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars.

The rights and shares which a defendant may have in the stock of any association or corporation, together with the interest and profits thereon, and all other property in this State of such defendant, shall be liable to be attached; and garnishees may be summoned.[1]

NORTH CAROLINA.

Upon complaint being made on oath to any judge of the supreme or superior courts, or to any justice of the county court, or clerk of the county or superior court, by any person, his attorney or agent, that any person indebted to him, or who hath endamaged him, as hereinafter mentioned, hath removed, or is privately removing himself out of the county, or absents himself from the county or State, or conceals himself, so that the ordinary process of law cannot be served on him; and if the plaintiff, his attorney or agent, further swears to the amount of his debt or demand, to the best of his knowledge or belief, such judge, justice, or clerk shall grant an attachment against the estate of such debtor, wherever the same may be found, or in the hands of any person indebted to, or having any of the effects of the defendant, or so much thereof as shall be of value sufficient to satisfy the debt or demand, and costs of such complaint; which attachment shall be returned to any court where the suit is cognizable, and shall be deemed the leading process, and the same proceedings shall be had thereon as on judicial attachments.

An attachment may be issued in favor of a resident of this State against a non-resident.

The officer, before granting an attachment, shall take bond and security of the party for whom the same shall be issued, his attorney or agent, payable to the defendant, in double the sum for which the complaint is made, conditioned for satisfying all costs which shall be awarded to the defendant, in case the plaintiff shall be cast in the suit, and also all damages which shall be recovered against the plaintiff in any suit which may be brought against him for wrongfully suing out the attachment.

The bond and affidavit shall be returned by the officer to the court to which the attachment is returnable; and every attachment issued without bond and affidavit taken and returned, as aforesaid, shall be abated on the plea of the defendant.

If any one shall do an injury to the proper person or property of another,

[1] Code of Procedure, Chapter IV. Title 7, §§ 227, 228, 229, 230, 234, 235.

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and shall within three months thereafter abscond beyond the limits of the State, or shall, within that time, conceal himself within the State, so that the ordinary process of law cannot be served on him, his estate may be attached to answer the damages for such injury, under the same rules as are prescribed for original or judicial attachments, provided the attachment be issued within three months after the injury done.

A judicial attachment issues, when, by the answer of a garnishee, it appears to the court that there is any of the defendant's estate in the hands of any person who has not been summoned. Under such an attachment the person having such estate in his hands may be summoned as garnishee.

No judicial process shall be issued against the estate of any person residing without the limits of the State, unless the same be grounded on an original attachment, or unless the leading process in the suit has been executed on the person of the defendant when within this State.

Under an attachment garnishees may be summoned, who are required to answer under oath.[1]

OHIO.

The plaintiff in a civil action for the recovery of money, may, at or after the commencement thereof, have an attachment against the property of the defendant, upon the following grounds: —

1. When the defendant, or one of several defendants, is a foreign corporation or a non-resident of this State; or,

2. Has absconded with the intent to defraud his creditors; or,

3. Has left the county of his residence to avoid the service of a summons; or,

4. So conceals himself, that a summons cannot be served upon him; or,

5. Is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors; or,

6. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,

7. Has property, or rights in action, which he conceals; or,

8. Has assigned, removed, or disposed of, or is about to dispose of, his property, or a part thereof, with the intent to defraud his creditors; or,

9. Fraudulently contracted the debt, or incurred the obligation for which suit is about to be, or has been, brought.

But an attachment shall not be granted on the ground that the defendant is a foreign corporation or a non-resident of this State, for any other claim than a debt or demand arising upon contract, judgment, or decree.

An order of attachment is made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his agent, or attorney, showing,

[1] Revised Code of North Carolina, of 1856, pp. 92 – 96.

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1. The nature of the plaintiff's claim;

2. That it is just;

3. The amount which the affiant believes the plaintiff ought to recover; and,

4. The existence of some one of the grounds for an attachment, above enumerated.

When the ground of the attachment is, that the defendant is a foreign corporation, or a non-resident of this State, the order of attachment may be issued without an undertaking. In all other cases, it shall not be issued until there has been executed in the clerk's office, by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking, not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages, which he may sustain by reason of the attachment, if the order be wrongfully obtained.

Under the order of attachment may be attached lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, moneys, and effects of the defendant, not exempt by law from the payment of plaintiff's claim.

When there are several orders of attachment against the same defendant, they shall be executed in the order in which they were received by the sheriff.

A receiver may be appointed by the court or any judge thereof during vacation, who shall take possession of all notes, due-bills, books of account, accounts, and all other evidences of debt, that have been taken by the officer, as the property of the defendant, and shall proceed to settle and collect the same. For that purpose, he may commence and maintain actions in his own name as such receiver; but in such actions no right of defence shall be impaired or affected.

The receiver is to give notice, forthwith, of his appointment to the persons indebted to the defendant; which notice shall be served by copy; and from the date of such service, the debtors shall stand liable to the plaintiff in attachment for the amount of moneys and credits in their hands or due from them to the defendant, and shall account therefor to the receiver.

An attachment may be obtained on a claim before it is due, —

1. Where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; or,

2. Is about to make such sale, conveyance, or disposition of his property, with such fraudulent intent; or,

3. Is about to remove his property, or a material part thereof, with the intent, or to the effect, of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts.

Garnishees may be summoned, who shall appear and answer, under oath,

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all questions put to them, touching the property of every description and credits of the defendant in their possession or under their control.[1]

OREGON.

In an action for the recovery of money, the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached, as a security for the satisfaction of such judgment as he may recover.

An attachment is issued by the clerk of the court in which the action is brought, when the plaintiff, his agent or attorney, makes affidavit that a cause of action exists against the defendant, specifying the amount of his claim, over and above all legal set-offs, and the nature thereof, and that, as the affiant verily believes, the defendant is either —

1. A foreign corporation ; or,

2. That he is not a resident of this Territory, or has departed therefrom with the intent to delay or defraud his creditors, or to avoid the service of a summons ; or,

3. That he has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of, his property, or any part thereof, with the intent to delay or defraud his creditors ; or,

4. That the debt was fraudulently contracted.

Before executing an attachment the officer to whom it is directed shall require a written undertaking on the part of the plaintiff, with one or more sureties, in a sum not less than two hundred dollars, nor exceeding the amount claimed by the plaintiff, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Under the writ the sheriff attaches real and personal property, and shares of stock in corporations, and summons garnishees.[2]

PENNSYLVANIA.

In this State the writ of domestic attachment issues against any debtor, being an inhabitant of the State, if such debtor shall have absconded from the place of his usual abode within the same, or shall have remained absent from the State, or shall have confined himself in his own house, or concealed himself elsewhere, with design, in either case, to defraud his creditors. And the like proceedings may be had if a debtor, not having become an inhabitant of the State, shall confine or conceal himself within the county, with intent to avoid the service of a process, and to defraud his creditors.

[1] Ohio Code of Procedure, of 1853, Ch. III.

[2] Revised Statutes of Oregon, of 1855, pp. 102 - 108.

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This writ does not issue, except upon oath or affirmation, previously made by a creditor, or by some person in his behalf, of the truth of his debt, and of the facts upon which the attachment shall be founded. It commands the officer to attach the goods and chattels, lands and tenements of the defendant, and to summon garnishees.

Upon the writ being executed the court appoints three trustees, to whom the officer delivers the personal property attached; and the trustees thereupon publish notice in a newspaper, requiring all persons indebted to the defendant, or holding property belonging to him, to pay and deliver the same to them, and also desiring all creditors of the defendant to present their respective accounts or demands.

All the estate of the defendant attached or afterwards discovered by the trustees vests in the trustees, and they may sue for and recover the same in their own names. They are authorized to summon all persons residing in the county, supposed to be indebted to the defendant, and examine them on oath, as they shall think fit, touching the real or personal estate of the defendant, and such other things as may tend to disclose their estates, or their secret grants; or alienation of their effects. If such persons reside in another county the trustees may send interrogatories in writing and examine them to the same effect.

The trustees may issue warrants commanding houses, chambers, shops, stores, and warehouses of the defendant to be broken open, and any trunks or chests of the defendant, in which his goods or effects, books of account, or papers relating to his estate, shall be, or shall be reputed to be, to be seized for the benefit of his creditors.

They are empowered to recover any property fraudulently disposed of by the defendant, and they may redeem mortgaged property.

They are authorized to sell the estate, real and personal, of the defendant which has become vested in them, and to assign any or all of the debts due or to become due to him, and the purchaser or grantee may sue for and recover such property or debts, in his own name, and to his own use.

The trustees then fix a day, and proceed to hear the proofs of all creditors of the defendant of their respective claims, and having stated their accounts, and ascertained the proportionate sum payable to each creditor, they file their report of the same in the office of the prothonotary; and if no exceptions to the report be filed within a limited time, they proceed to distribute the money, ratably and without preference among all the creditors who have proved their claims.

The death of the defendant after the issuing of an attachment does not abate or otherwise affect the proceedings thereon.

No second or other attachment can be issued against, or served upon the estate or effects of the same defendant, except those issued into another

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county, unless the first attachment be not executed, or be dissolved by the court.[1]

The writ of foreign attachment lies against a foreign corporation, and against any person not residing within the State, and not being within the county at the time the writ issues. Under it real and personal estate may be attached, and garnishees summoned, who are required to answer, under oath, such interrogatories as the plaintiff may propound, touching the estate and effects of the defendant in their hands, or due or owing from them to the defendant.

A writ of attachment also issues against a person under sentence of imprisonment, upon conviction of crime.

The writ of foreign attachment seems to issue as a matter of right, without the necessity of affidavit, and the benefit of it enures to the attaching creditor, and not to all his creditors, as in the case of the domestic attachment.[2]

RHODE ISLAND.

Whenever a writ of arrest, or other writ authorizing an arrest, shall be delivered to an officer for service, he shall use his best endeavors to arrest the body of the defendant; but if he cannot find the body of the defendant he shall attach his goods and chattels, to the value commanded in the writ; and when any attachment is made as aforesaid, the same shall be sufficient to bring the cause to trial.[3]

When any person shall reside or be absent out of this State, or shall conceal himself therein so that his body cannot be arrested, and when any incorporated company established out of this State shall be indebted or liable to any person, then the personal estate of such absent or concealed person or foreign corporation, lodged or lying in the hands of their attorney, agent, factor, trustee, or debtor, shall be liable to be attached, the plaintiff giving special order therefor, on the back of the writ, to answer any just debt or demand; and the serving of any person or body corporate, or any member of any firm or copartnership who have such personal estate in their hands, with a copy of a writ taken out against such absent or concealed person, or foreign corporation, shall be a good service of said writ.[4]

The garnishee is to render an account on oath of what estate he had of the defendant at the time of the service of the writ.

[1] Dunlop's Laws of Pennsylvania, 2d Ed., pp. 757–763.
[2] Dunlop's Laws of Pennsylvania, pp. 740–746.
[3] Public Laws of Rhode Island, 113.
[4] Public Laws of Rhode Island, 118.

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SOUTH CAROLINA.[1]

The creditor, wherever residing, is entitled to sue out a writ of foreign attachment when the debtor resides or is without the limits of the State,[2] or absconds or conceals himself so that process cannot be served upon him for the space of three months.[3] But partnership property cannot be attached for partnership debts when one of the copartners is within the State, or when the resident copartner before leaving the State publishes a notice of his intention to leave and his readiness to answer any suits.[4] Nor can the property of an individual be attached, where notice is given in like manner.

Under the writ, moneys, goods, chattels, debts, and books of account,[5] land, leasehold estates, and chattels real,[6] may be attached in the hands of the garnishee, and the garnishee required to appear in court and show cause why the attached effects should not be adjudged to belong to the absent debtor.

The writ issues of common right upon the creditor, or his agent giving bond, with sureties approved by the clerk, in double the amount for which the attachment issues, conditioned to answer to defendant, the absent debtor, for all illegal conduct in obtaining or prosecuting the attachment.[7]

On service of the writ the garnishee must make a return under oath to the next court thereafter, setting forth the property, real or personal, in "his possession, power, custody, or control," belonging to the absent debtor.[8]

If the garnishee claim the attached effects as creditor in possession, he should set forth in his return specifically the effects attached, and also the amount and nature of the indebtedness of the absent debtor to him; and if the effects attached were obtained *bonâ fide* and legally by the garnishee, he shall be allowed his debt, he filing his declaration and proceeding in every respect as if he were plaintiff in attachment.[9]

If plaintiff is not satisfied of the correctness of garnishee's return, he may contest it by filing suggestions to be tried by a jury, and if the garnishee or any other person claim property in the effects attached, the truth shall be ascertained by a feigned issue in which the garnishee or party claiming shall be actor.[10]

Where the garnishee is in possession of property, known or supposed to

[1] For this statement of the provisions of the Laws of South Carolina in relation to Attachment I am under obligation to JAMES CONNER, Esq, of Charleston, Author of "Conner's Digest" of South Carolina Reports, and District Attorney of the United States for South Carolina.

[2] Act of 1744, 3 Statutes, 617.

[3] Act of 1751, 3 Statutes, 731.

[4] Act of 1744, 3 Statutes, 620.

[5] Act of 1744, 3 Statutes, 617.

[6] Act of 1783, 4 Statutes, 544.

[7] Act of 1839, 11 Statutes, 76.

[8] Act of 1844, 11 Statutes, 290.

[9] Act of 1744, 3 Statutes, 619.

[10] Act of 1744, 3 Statutes, 618.

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belong to the absent debtor, he may be compelled, on service of the writ, to deliver it to the sheriff, or claiming it under oath as creditor in possession, to give bond for its forthcoming.[1]

If the garnishee fail to make a return, as required, judgment shall be given against him, and execution levied on his proper goods for satisfaction of the debt attached for, the same being legally proved.[2]

Upon the return to the writ either by the sheriff or garnishee, assignees are appointed by the court to take possession of the attached property, to sell the same if of a perishable nature, and to sue, in the name of the absent debtor, for moneys due him on the books or accounts attached, the assignees giving bond for faithful performance of their duties.[3]

The declaration should be filed within two months after the return of the writ, the plaintiff making affidavit of the sum due, and that no part of the same is paid, and that he is in no wise indebted to the absent debtor. If there have been mutual dealings between debtor and creditor, a stated account showing the balance due should be sworn to and filed with the declaration.[4]

The absent debtor has a year and a day within which to appear and plead to the declaration. If he fail so to do within that time, judgment shall be entered against him, but the effect and operation of such judgment is limited to the property attached.[5]

If the absent debtor appear within the year and day and puts in special bail, the attachment is dissolved, and the proceeding becomes then strictly *in personam.*

If the absent debtor appear in person or by attorney, without putting in special bail and judgment is entered up against him, the execution issuing on such judgment may be levied on the general estate of the defendant as well as on the attached effects.[6]

TENNESSEE.

Where a debtor has removed or is removing himself out of the county privately, or so absconds or conceals himself that the ordinary process of law cannot be served on him; or is removing or about to remove himself or his property beyond the limits of the State; or shall be absconding or concealing himself or his property or effects; an attachment may be obtained.

In order to obtain an attachment, complaint must be made on oath by the creditor, his attorney, agent, or factor, setting forth that the debtor is

[1] Act of 1844, 11 Statutes, 290.
[2] Act of 1744, 3 Statutes, 618, and 1844, 11 Statutes, 290.
[3] Act of 1844, 11 Statutes, 290.
[4] Act of 1744, 3 Statutes, 619.
[5] Act of 1843, 11 Statutes, 256.
[6] Act of 1843, 11 Statutes, 256.

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doing some one of the acts stated above; and a bond must be given by the plaintiff, his attorney, agent, or factor, payable to the defendant, in double the sum for which the complaint is made, conditioned for satisfying all costs which shall be awarded to the defendant in case the plaintiff shall be cast in the suit, and also all damages which shall be recovered against the plaintiff in any suit or suits which may be brought against him for wrongfully suing out the attachment.

The writ commands the attachment of the estate of the debtor wherever it may be found, or in the hands of any persons indebted to, or having any of the effects of, the defendant; and under it garnishees are summoned, who are required to answer on oath as to their indebtedness to the defendant, and what effects they have and had of the defendant in their hands at the time of serving the writ, and what effects or debts of the defendant there are in the hands of any other, and what, person, to their knowledge or belief.[1]

In the case of non-resident debtors, having any real or personal property or choses in action within the State, it is required, in order to obtain an attachment, to file a bill in chancery, and make affidavit and give bond as in the cases above mentioned.[2]

A judicial attachment issues when the sheriff returns "that the defendant is not found."[3]

TEXAS.

Whenever a writ of summons issues from any court of this State, in any civil suit, and the officer returns that the defendant is not to be found in his county, the plaintiff may sue out a writ of attachment, returnable in the same manner as original writs; and if the officer shall return any property by him attached, and the defendant shall fail to appear and plead within the time limited by the law regulating pleadings, the plaintiff shall be entitled to judgment as in ordinary suits; and the property attached, if not replevied, or released by special bail, shall remain in the custody of the officer, until final judgment.

Original attachments are issued, upon the party applying for the same, his agent or attorney, making an affidavit in writing, stating that the defendant is justly indebted to the plaintiff, and the amount of the demand; and that the defendant is not a resident of the State; or that he is about to remove out of the State; or that he secretes himself so that the ordinary process of law cannot be served on him; or that he is about to remove his property beyond this State, and that thereby the plaintiff will probably lose the debt; and he shall also swear that the attachment is not sued out for the purpose of injuring the defendant.

[1] Caruthers & Nicholson's Digest, 101, 102, 103 and Nicholson's Supplement, 12.
[2] Caruthers & Nicholson's Digest, 106.
[3] Caruthers & Nicholson's Digest, 108.

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At the time of making such affidavit, the plaintiff, his agent or attorney, shall give bond, with two or more good and sufficient sureties, payable to the defendant, in at least double the amount sworn to be due, conditioned that the plaintiff will prosecute his suit to effect, and pay such damages as shall be adjudged against him for wrongfully suing out such attachment.

The writ of attachment goes against the property of the debtor, wherever the same may be found.

It may issue in all cases, although the debt or demand be not due; but no judgment shall be rendered until the demand becomes due.

Where an attachment, either original or judicial, is issued, the plaintiff may have at the same time a writ of garnishment, against any person supposed to be indebted to, or to have any of the effects of, the defendant. Garnishees summoned under this writ must answer on oath as to their indebtedness, or that of others, to the defendant, and as to the effects of the defendant they have in their possession, and had at the time of the garnishment.[1]

VERMONT.

The ordinary mode of process, in civil causes, is by writ of summons or attachment.

Writs of attachment may issue against the goods, chattels, or estate of the defendant, and for want thereof against his body.

No writ shall issue unless there be sufficient security given to the defendant, by way of recognizance, by some person other than the plaintiff, to the satisfaction of the authority signing the writ, that the plaintiff shall prosecute his writ with effect, and shall answer all damages, if judgment be rendered against him.[2]

All actions founded on any contract, express or implied, made and entered into since the first day of January, 1839, and all actions, founded on any contract where the defendant has absconded from, or is resident out of, this State, or is concealed within this State, may be commenced by trustee process.

The writ, in such case, authorizes the attachment of the goods, chattels, or estate of the defendant, in his own hands, and also any goods, effects, or credits, in the hands of the trustees.

Every person, having any goods, effects, or credits of the defendant, intrusted or deposited in his hands or possession, or which shall come into his hands or possession after the service of the writ and before disclosure is made, may be summoned as a trustee, and such goods, effects, and credits shall thereby be attached, and held to respond the final judgment in the suit. Whatever any trustee may have of the defendant's in his hands or

[1] Hartley's Digest of Texas Laws, of 1850, pp. 93 – 100.
[2] Williams's Compilation of Vermont Laws, of 1851, p. 242.

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possession, which he holds against law or equity, may be attached by this process.

Any debt or legacy, due from an executor or administrator, and any other goods, effects, or credits, in the hands of an executor or administrator, as such, may be attached in his hands by the trustee process.

All corporations may be summoned as trustees.

No person shall be adjudged a trustee in either of the cases following, to wit: —

1. By reason of any money or other thing due from him to the defendant, unless it is, at the time of the service of the writ on him, due absolutely and without depending on any contingency; nor, 2. By reason of any debt due from him on a judgment, so long as he is liable to an execution on the judgment.

Any money, or other thing due to the defendant, may be attached by the trustee process before it has become payable, provided it be due absolutely and without any contingency; but the trustee shall not be compelled to pay or deliver it before the time appointed therefor by the contract.

Trustees may be examined on oath, touching the effects, &c., of the defendant in their hands; but the answer of a trustee under oath is not conclusive in deciding how far he is chargeable; but either party may allege and prove any facts that may be material in deciding that question.[1]

There are numerous provisions in the laws of this State in relation to trustees, but it is not deemed necessary to present them here.

VIRGINIA.

When any suit is instituted for any debt, or for damages for breach of any contract, on affidavit stating the amount and justice of the claim, that there is a present cause of action therefor, that the defendant is not a resident of this State, and that the affiant believes he has estate or debts due him within the county or corporation in which the suit is, the plaintiff may forthwith sue out of the clerk's office an attachment against the estate of the non-resident defendant for the amount so stated.

On affidavit at the time of or after the institution of any suit, that the plaintiff's claim is believed to be just, and, where the suit is to recover specific personal property, stating the nature, and, according to the affiant's belief, the value of such property, and the probable amount of damages the plaintiff will recover for the detention thereof, or where it is to recover money for any claim or damages for any wrong, stating a certain sum which (at the least) the affiant believes the plaintiff is entitled to, or ought to recover,

[1] Williams's Compilation of Vermont Laws, of 1851, pp. 254 – 258.

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and an affidavit also, that the affiant believes that the defendant is removing or intends to remove such specific property, or his own estate, or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this State, so that process of execution on a judgment in said suit, when it is obtained, will be unavailing; in any such case the clerk shall issue an attachment. If the suit be for specific property, the attachment may be against the specific property sued for, and against the defendant's estate, for so much as is sufficient to satisfy the probable damages for its detention; or, at the option of the plaintiff, against the defendant's estate, for the value of such specific property, and the damages for its detention. If the suit be to recover money for a claim, or damages for a wrong, the attachment shall be against the defendant's estate, for the amount specified in the affidavit, as that which the affiant believes the plaintiff is entitled to or ought to recover.

An attachment may issue before a claim is due and payable, upon complaint supported by affidavit that the debtor intends to remove, or is removing, or has removed his effects, out of this State, so that there will probably not be therein sufficient effects of the debtor to satisfy the claim when judgment is obtained therefor, should the ordinary process of the law be used to obtain such judgment; and upon further affidavit of the amount and justice of the claim, and at what time the same is payable.

An attachment also lies for rent, where complaint is made, supported by affidavit, that the tenant intends to remove, or is removing, or has within thirty days removed, his effects from the leased premises.

Attachments (except where sued out specially against specified property) may be levied upon any estate, real or personal, of the defendant, and garnishees may be summoned, who are required to answer on oath.

Equitable claims for money or property may be enforced by suit and attachment in chancery, upon affidavit being made as in actions at law.[1]

WISCONSIN.

In order to obtain an attachment, the plaintiff, or some person in his behalf, must make an affidavit, stating that the defendant is indebted to the plaintiff, and specifying the amount of such indebtedness, as near as may be, over and above all legal set-offs, and that the same is due upon contract, express or implied, or upon judgment or decree, and that the deponent knows, or has good reason to believe, either, —

1. That the defendant has absconded, or is about to abscond from this State, or that he is concealed therein to the injury of his creditors; or,

2. That the defendant has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal any of his property, with intent to defraud his creditors; or,

[1] Revised Statutes of Virginia, of 1849, pp. 600 – 605

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3. That the defendant has removed, or is about to remove, any of his property out of this State, with intent to defraud his creditors; or,

4. That he fraudulently contracted the debt, or incurred the obligation, respecting which the suit is brought; or,

5. That the defendant is not a resident of this State; or,

6. That the defendant is a foreign corporation; or,

7. That the defendant has fraudulently conveyed or disposed of his property, or a part of it, or is about fraudulently to convey or dispose of the same, or a part of it, with intent to defraud his creditors.

The writ authorizes the attachment of so much of the lands, tenements, goods, chattels, moneys, and effects of the defendant, not exempt from execution, wheresoever the same may be found within the county, as will be sufficient to satisfy the plaintiff's demand.

If the plaintiff, or any one in his behalf, make affidavit that he verily believes that any person (naming him) has property, credits, or effects (describing the same), in his possession belonging to the defendant, or is indebted to the defendant, and deliver the same to the officer having the writ, the officer, if he cannot attach such property and get possession thereof, shall summon such person as garnishee; who is required to answer under oath all questions put to him touching the property, credits, and effects of the defendant in his possession, or within his knowledge, and as to all debts due or to become due from him to the defendant.[1]

TERRITORY OF NEBRASKA.

In an action for the recovery of money, the plaintiff may cause any property of the defendant, which is not exempt from execution, to be attached, at the commencement or during the progress of the proceedings.

The petition must set forth the grounds of attachment, and must be sworn to. It must state that as the affiant verily believes the defendant is

1. A foreign corporation, or acting as such; or,

2. Is a non-resident of the Territory; or,

3. Is in some manner about to dispose of, or remove his property out of the Territory, without leaving sufficient remaining for the payment of his debts; or,

4. Has disposed of his property, in whole or in part, with intent to defraud his creditors; or,

5. Has absconded, so that the ordinary process cannot be served upon him; or,

6. That he has property not exempt from execution which he refuses to give in security of payment of his debt.

If the plaintiff's demand is founded on contract, the petition must state

[1] Revised Statutes of Wisconsin, of 1849, pp. 587 – 592.

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as nearly as practicable the amount due and when payable. If not founded on contract, the petition must be presented to some judge of the Supreme or District Court, or Judge of Probate, who shall make an allowance thereon of the amount in value of property that may be attached.

An attachment may issue before the debt becomes due, when nothing but time is wanting to fix an absolute indebtedness, and when the petition, in addition to that fact, states that the defendant is about to dispose of his property with intent to defraud his creditors, or that he is about to remove from the Territory, and refuses to make any arrangement for securing the payment of the debt when it falls due, and which contemplated removal was not known to the plaintiff at the time the debt was contracted.

Before any property can be attached, the plaintiff must file with the clerk a bond for the use of the defendant, with sureties, to be approved by the clerk, in a penalty at least double the value of the property sought to be attached, and in no case less than two hundred and fifty dollars, conditioned that the plaintiff will pay all damages that the defendant may sustain by reason of the wrongful suing out of the attachment.

The sheriff is required to attach property fifty per cent greater in value than the amount to be secured by the attachment.

In an action on the bond, the defendant may recover, if he shows that the attachment was wrongfully sued out, and if wilfully wrong he may recover exemplary damages. And he need not wait until the principal suit is determined, before he brings suit on the bond.

Garnishees may be summoned. A sheriff or constable may be garnished for money of the defendant in his hands. So may a judgment debtor of the defendant, when the judgment has not been previously assigned, and also an executor, for money due from the decedent to the defendant.[1]

TERRITORY OF NEW MEXICO.

Creditors whose demands amount to fifty dollars or more may sue their debtors in the circuit court, by attachment in the following cases: —

1. When the debtor is not a resident of, nor resides in, this Territory.

2. When the debtor has concealed himself, or absconded, or absented himself from his usual place of abode in this Territory, so that the ordinary process of law cannot be passed upon him.

3. When the debtor is about to remove his property or effects out of this Territory; or has fraudulently concealed or disposed of his property or effects, so as to defraud, hinder, or delay his creditors.

4. When the creditor is about fraudulently to convey or assign, conceal or dispose of, his property or effects, so as to hinder, delay, or defraud his creditors.

5. When the debt was contracted out of this Territory, and the debtor

[1] Laws of Nebraska, of 1857, ch. 31, pp. 98 – 102.

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has absconded, or secretly removed his property or effects into the Territory, with the intent to hinder, delay, or defraud his creditors.

In order to obtain an attachment an affidavit must be made by the plaintiff or some person for him, and a bond executed.

The affidavit must state that the defendant is justly indebted to the plaintiff, after allowing all just credits and offsets, in a sum, to be specified, and on what account, and that the affiant has good reason to believe, and does believe, the existence of one or more of the causes above recited as entitling the plaintiff to sue by attachment.

The bond must be executed by the plaintiff or some responsible person as principal, and two or more securities, residents of the county in which the action is to be brought, in a sum at least double the amount sworn to, payable to this Territory, conditioned that the plaintiff shall prosecute his action without delay and with effect, and refund all sums of money that may be adjudged to be refunded to the defendant, and pay all damages that may accrue to any defendant or garnishee by reason of the attachment, or any process or judgment thereon. This bond may be sued on in the name of the Territory, by any party injured.

The writ of attachment commands the sheriff to attach the defendant by all and singular his lands and tenements, goods, moneys, effects, and credits, in whosesoever hands they may be found; and under it garnishees may be summoned, who are required to answer on oath written allegations and interrogatories.[1]

TERRITORY OF UTAH.

An attachment issues in this Territory, when an affidavit is made by a creditor that the defendant is indebted to him by note or book account, and is not a resident of the Territory, or is about to leave the county or Territory, removing his effects with the intention, as affiant believes, of defrauding his creditors.

If there be not sufficient property found to satisfy the debt and cost, garnishees may be summoned.[2]

TERRITORY OF WASHINGTON.

In an action for the recovery of money, the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached, as a security for the satisfaction of such judgment as he may recover.

An attachment is issued by the clerk of the court in which the action is brought, whenever the plaintiff, his agent or attorney, shall make affidavit that a cause of action exists against the defendant, specifying the amount of

[1] Laws of New Mexico, of 1851, pp. 39–41. [2] Laws of Utah, 1851, p. 62.

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the claim, over and above all legal set-offs, and the nature thereof, and that, as the affiant verily believes, the defendant is either

1. A foreign corporation; or,

2. A non-resident of this Territory; or,

3. Is secretly leaving, or has left the Territory, with intent to hinder, defraud, or delay his creditors; or,

4. Is about to sell, convey, or otherwise dispose of his property, with like intent; or,

5. Is removing, or about to remove, his property, subject to execution, or a material part thereof, out of this Territory, not leaving enough therein to satisfy the claim of the plaintiff; or,

6. Has concealed, or is attempting to conceal himself, so that the ordinary process of law cannot be served upon him.

No attachment, for the second and third causes above stated, shall issue against any debtor while his family remains settled within the county where he usually resided, prior to his absence, if he shall not continue absent from the Territory more than one year after he shall have absented himself, unless an attempt be made to conceal his absence.

If the wife or family of the debtor shall refuse or be unable to give an account of the cause of his absence, or the place where he may be found, or shall give a false account of either, such refusal, inability, or false account shall be deemed an attempt to conceal his absence.

Before the writ issues, the plaintiff, or some one on his behalf, must execute a bond, with sufficient surety, to be approved by the clerk, payable to the defendant, to the effect that the plaintiff will duly prosecute his proceeding in attachment, and will pay all damages which may be sustained by the defendant, if the proceedings of the plaintiff shall be wrongful and oppressive.

Real and personal property, and shares of stock and corporations, may be attached.

Personal property may be released from attachment by giving bail to the action; and may be released from the sheriff's custody by giving a delivery bond.

Garnishees may be summoned. In order thereto, the plaintiff, or some one on his behalf, must file with the clerk an affidavit that he has good reason to believe that any named person has property of the defendant, of any description, in his possession, or under his control, which the sheriff cannot attach; or that such person is indebted to the defendant, or has the control or agency of any property, money, credits, or effects. Thereupon the clerk issues a summons to the person named, to appear and answer as garnishee.

Any creditor of the defendant, upon filing his affidavit and bond, as required of the attaching creditor, may at any time before the final adjournment of the suit, become a party to the action, file his complaint, and prove

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his claim or demand against the defendant, and may have any person summoned as garnishee. The money realized by the attachment shall go first to satisfy the first attaching creditor; and if anything remain it must be divided, *pro rata*, among the other creditors.[1]

[1] Laws of Washington, passed at the First Session of the Legislative Assembly, in February, 1854, pp. 155 – 162.

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